IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1309

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX.

RELEVANT DOCKET ENTRIES.

12/26/61 Filed complaint and copy (JS 5)

1/19/62 Filed Notice and Motion to strike and dismiss and exhibits (2, 1) E

6/ 7/61 Filed Notice of Appeal of Plaintiff

11/21/63 Filed Mandate of U. S. C. A., 7th Circuit. Judgment of D. C. entered 5/14/62 reversed with costs & cause is hereby remanded to D. C. mm

1/ 8/64 Filed defendant's notice & motion for summary judgment and affidavit & exhibits. mm

3/20/64 Filed defendant's notice and answer and Exhibit "A" mm

7/30/64 Ordered by agreement time for filing of deft's brief in support of mo for summary judg extended to and including Aug. 18, 1964, and leave granted to enter appearance of Lawrence Gunnels as additional attorney for deft Time, Inc. Austin, J.

12/28/64 The Court rules orally from bench, denying pltff's motion to strike motion of deft for summary judgment and granting motion of deft for summary judgment, with deft to present order consistent with said ruling within 2 days hereof—Robson, J.

12/30/64 Enter order granting deft's motion for summary judgment and denying pltff's motion to strike said motion, and deft's motion for summary judgment is hereby granted and entered

for the deft with pltff to take nothing and cause hereby dismissed on the merits, with prejudice—Robson, J.

1/27/65 Filed plaintiff's notice of appeal

4/ 2/65 Certified and transmitted record on appeal to U. S. C. A., 7th Circuit (Deposition under sep. cert.)

5/16/66 Filed Mandate U. S. C. A. Judgment of the U. S. D. C. is Reversed and cause is Remanded. JS-5

11/ 9/66 Order leave defendant to file amended answer. Plaintiff to reply within 30 days.—Will, J.

2/ 1/67 Filed deposition of Karen Booth and exhibits thereto.

3/ 9/67 Filed deposition of Richard Wolfe. G

3/27/67 Filed Amendment to plaintiff's answer to interrogatories.

4/17/67 Enter Order sustaining objections to requests 21-25, 29, 30, 40-41, overruling objections to requests 5-10, 13, 16-1, 17-20, 26, 27 and 28. Order plaintiff to answer said requests within 10 days hereof.

4/17/67 Enter Order closing discovery except as to character witnesses and order cause added to final pre trial conference calendar.

6/15/67 Filed depositions of Robert E. Gibbons, William McGurn, John Higgins, Royal Besserer, Nisida Besserer, Eula McGurn, six (6) volumes.

6/15/67 Filed depositions of Judith P. Clark, Mary Kelly, Timothy J. Moore, John Dennis Mark, Dr. Michael Cantalupo, Michael Kelly, Maurice J. McCarthy, Jr., Gerald F. Pape, Catherine M. Pape, Champ Clark, Edward F. Magnuson, eleven (11) volumes.

6/21/67 Filed plaintiff's reply.

6/21/67 Pre trial conference held. Order parties to submit final pretrial order and simultaneous memorandums on legal issues on July 31, 1967 at 10 a.m. Order leave to file instanter plaintiff's reply to the amended answer. Will, J.

7/27/67 Filed Depositions of Samuel W. Nolan, Richard C. Clark and Frank J. Hanley.

10/23/67 Filed plaintiffs motion to file amended Complaint and Summary of Proof of Special Damages.

11/ 2/67 Filed Amended Complaint.

11/ 2/67 Enter Order granting leave to plaintiff to file Amended Complaint including allegations of special damages and punitive damages and said Amended Complaint filed instanter with leave to defendant to answer or otherwise plead within ten days hereof.

11/16/67 Filed Defendant's Answer to Amended Complaint. EOB

12/14/67 Court rules orally from bench. Order objections of defendant to Plaintiffs answers to interrogatories hereby overruled. Order cause to proceed to trial first on the issue of malice. Order cause continued to January 23, 1968 for report on status of discovery. Robson, J.

1/ 4/68 Filed plaintiff's reply to Amended Answer.

5/ 9/68 Pre-trial conference held. Order cause set for June 7, 1968 at 10 a.m. for ruling on legal issues and to set for trial—Robson, J.
Mailed Notices 5/13/68

6/ 7/68 Enter order overruling plaintiffs objections to "morgue" exhibits. Order cause added to head of trial list to be called on September 10, 1968 and parties to present stipulation facts and suggested pretrial order by June 24, 1968, Robson, J.

1/13/69 Cause called for trial—Jury selected and sworn: Donald M. Komers, Richard H. Hunt, James B. Collins, Dorothy L. Doran, Fred Dede, Estele Piehler, Joan B. Colky, Frank Zirzow, Judy Chrisman, Edward D. Singleton, Michael S. Pennington, and Michael J. Mousel, Jr., Opening statements made. Evidence heard in part for plaintiff. Order Jury to separate and cause adjourned until January 14, 1969— Robson, J.

1/14/69 Filed Motion of defendant for directed verdict at close of plaintiff's case.

1/14/69 Further evidence heard for plaintiff—plaintiff rests—At close of Plaintiff's case defendant moves that Court direct jury to return a verdict for the defendant. Arguments heard and concluded on said motion and order cause set for ruling on said motion on January 15, 1969.

1/15/69 Order motion of defendant made at close of plaintiff's case for directed verdict in its favor hereby denied. Evidence heard for defendant. Defendant rests. Rebuttal evidence heard for

plaintiff. Plaintiff rests. Both sides rest. At close of all evidence defendant renews motion for directed verdict in its favor. Arguments heard and concluded on said motion and order said motion entered and continued to January 16, 1969 for ruling. Order jury to separate and cause adjourned until January 16, 1969—Robson, J.

1/16/69 Pursuant to memorandum filed herewith order defendant's motion for a directed verdict at the close of all evidence hereby granted with judgment hereby rendered for the defendant on the issue of liability and cause hereby dismissed without costs—Draft—Robson, J.

2/14/69 Filed Plaintiff's notice of appeal.

2/14/69 Filed Bond on appeal.

3/ 6/69 Clerk's file copy of transcript of proceedings had before the Hon. Edwin A. Robson, Judge on January 13, 14, 15 and 16, 1969, filed by the Official Court Reporter—5 volumes. B

3/ 6/69 Filed Plaintiff's Exhibits 1, 2, 3 and Defendant's Exhibits A thru T inclusive. B

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 15101 September Term and Session 1965.

FRANK PAPE,
Plaintiff-Appellant,
v.
TIME, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1965.

(Filed May 16, 1966)

Before DUFFY and SWYGERT, *Circuit Judges,* and GRUBB, *Senior District Judge.*

DUFFY, *Circuit Judge.* Plaintiff Pape brought this suit seeking damages for libel. Jurisdiction was based upon diversity of citizenship. The complaint alleged the defendant, Time, Incorporated, publisher of the national weekly news magazine "Time", had defamed plaintiff in its November 24, 1961 issue. The allegedly libelous story reported the issuance and summarized the contents of the United States Civil Rights Commission's 1961 annual report. This Report entitled "Justice" is in book form. Chapter 2 is devoted largely to a description of alleged police brutality to Negroes.

The Time article entitled "Civil Rights—Dawdling on the Corner", was based largely on Chapter 2 of the Commission's Report entitled "Patterns of Police Brutality."

Time reported an incident which it claimed had occurred in Chicago involving brutality by Pape and other police

officers while arresting members of a Negro family named Monroe.

In the District Court, defendant moved to dismiss—in effect, urging the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion. On appeal, this Court reversed. Pape v. Time, Incorporated, 318 F. 2d 652. We stated that the subordinate, vital question was whether Time's story of the Commission's Report of the Pape incident was fair comment. In our opinion, we pointed out that the question then before us was not what the Commission's Report had said about Pape, but rather, what Time's article had said about the Report. We then noted that Time's article told the reader that the Report stated that Pape and others had actually committed certain acts. In fact, the Report had merely said that these acts were allegations in Monroe's complaint.

We stated "Under Illinois law, governing here, Time can be liable if it goes beyond that limit [fair comment] and states as a fact that which is not true. . . ."

We then said "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission report."

We decided that the complaint stated a claim upon which relief could be granted, and we reversed and remanded for further proceedings.

Subsequent to remand, the Supreme Court of the United States decided New York Times Co. v. Sullivan, 376 U. S. 254. Thereafter, defendant took Pape's pretrial deposition. Pape testified he had been in the Chicago police department

since 1933 and was presently a captain of police. He admitted that he and police officers under his command had gone to the Monroe house on the evening in question. At that time, he was deputy chief of detectives for Chicago. He had been appointed to that position by the Commissioner of Police. His permanent rank at that time was lieutenant of police.

In New York Times, the Supreme Court stated (376 U. S. p. 283) "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable."

Footnote 23 referred to, stated in part—"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . ." It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official. . . ."

Plaintiff urges that the Supreme Court thus confined its holding in New York Times to an "elected" public official. Also, that plaintiff was not a "public official" within the meaning of that case because he had neither been elected to his office, nor appointed nor confirmed in his appointment by an elective body.

We do not read New York Times v. Sullivan as being limited to an elected public official. The Supreme Court based its decision, at least in part, upon certain precedents involving appointed officials. In one of the cited cases, the libel plaintiff was a Deputy Superintendent of Police for the city of Detroit. Lawrence v. Fox, 357 Mich. 134, 97 N. W. 2d 719. In another of the cited cases, the plain-

tiff was the Chief of Police of Los Angeles—Snively v. Record Publishing Company, 185 Cal. 565, 198 P. 1.

Subsequent decisions to New York Times clearly indicate the courts do not understand the rule announced in that case to be confined to elected public officials. In Henry v. Collins, 380 U. S. 356 (1965), the Supreme Court applied the New York Times doctrine to the Chief of Police of Clarksdale, Mississippi. The Chief was an appointed officer.

In Tucker v. Kilgore, 388 S. W. 2d 112 (Ky. 1965), the Court applied the New York Times doctrine to an ordinary police patrolman in the city of Louisville, Kentucky. See also State v. Browne, 206 A. 2d 591 (N. J. 1965) and Matassa v. Bel, 164 So. 2d 332 (La. 1964).

We hold that on the date Pape arrested James Monroe, when Pape held the position of deputy chief of detectives and lieutenant of police, he was a public official as that designation was used in New York Times v. Sullivan.

We turn, therefore, to consider whether the existence of "actual malice" by Time, Incorporated presented a jury question. The Supreme Court in New York Times v. Sullivan, stated at 376 U. S. 279-280: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."

The record before us shows that Time, Incorporated was, at least, negligent in printing as established facts, matters and events which the Commission's Report stated were mere allegations in a complaint. But, negligence is not enough.

In New York Times, the newspaper admitted it had had evidence in its own files affirmatively showing the falseness

of numerous statements in the publication . . . 376 U. S. at pages 287-288; also, that the Times had accepted and published the advertisement without in any way checking its accuracy against outside sources or material in its files. 376 U. S. 287.

The Supreme Court further said—376 U. S. at pages 287-288—"We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

In Garrison v. Louisiana, 376 U. S. 64, the Supreme Court applied the New York Times rule to criminal libel, holding that actual malice must be proved to convict an individual for libeling a public officer. The Court there defined malice as "only those false statements made with the high degree of awareness of their probable falsity. . . ." 379 U. S. 74.

The burden of proving actual malice is upon Pape. He admitted in his pretrial deposition that he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate attempt to harm him. He argues, however, that this question is already settled by reason of our decision in Pape v. Time, Incorporated (1962), 318 F. 2d 652.

Our previous decision was made prior to New York Times v. Sullivan. There, the District Court had dismissed the complaint on the defendant's motion so that all the well-pleaded facts stood admitted before us. We applied Illinois law.

We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.

As stated in our previous decision—". . . Time took the risk when it rewarded parts of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers did what the Commission Report merely said the Monroe complaint alleged they did."

We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment.

The judgment of the District Court is reversed and remanded for further proceedings.

REVERSED AND REMANDED

In the United States District Court.
* * (Caption—No. 61 C 2202) * *

MOTION.

(Filed—Sept. 15, 1967)

Now comes Frank Pape by John M. Kaveny, his attorney, and asks the Court for leave to amend his Complaint filed herein by amending the prayer for damages to read as follows:

Wherefore, plaintiff demands judgment against defendant for the sum of One Hundred Thousand Dollars ($100,000.00) actual damages, and the further and additional sum of Two Hundred Fifty Thousand Dollars ($250,000.00) exemplary damages, and for his costs;

A copy of which Amended Complaint is attached hereto.

Frank Pape,
By: /s/ John M. Kaveny,
John M. Kaveny,
His Attorney.

In the United States District Court.
* * (Caption—No. 61 C 2202) * *

SUMMARY OF PROOF OF SPECIAL DAMAGES.

1. During the period from 1940 to 1950 when the plaintiff was a Sergeant of Police assigned to the Robbery Detail, he and his squad of two men were responsible for the arrest and conviction of one hundred forty-three persons, all of which were sentenced to the Illinois State Penitentiary for various terms. The arrest of the foregoing persons solved eight hundred fifteen crimes com-

mitted in the Chicago Metropolitan area, including ten murders, two assaults with intent to kill, seven hundred ninety-three robberies, eight burglaries and two larcenies. The foregoing record does not include arrests by plaintiff and his squad for lesser crimes for which conviction the parties were sentenced to the County Jail, House of Correction and juvenile correctional institutions or placed on probation.

2. During the period from 1940 to 1950 the plaintiff and his squad killed six men while attempting to effect their arrest and wounded six other men while attempting to effect their arrest.

3. During the period from 1940 to 1960 the plaintiff has been cited for outstanding performances by the following: Chicago Daily Tribune, Chicago Herald-American, Chicago Sun-Times, Coronet Magazine, American Weekly Magazine, Police Digest, Illinois Policeman, the Coroner of Cook County on four occasions, the Chicago Crime Commission on four occasions, the Civil Service Board on two occasions, the Police Merit Board and, in addition, plaintiff has received eighteen creditable mentions and nine extra compensations for his work as a policeman during said period of time.

4. During plaintiff's tenure as head of the Robbery Detail from March 1953 through 1957, the Detail arrested and obtained the conviction of seven hundred twenty-four persons who were sentenced to the Illinois State Penitentiary. While Captain Pape was Commanding Officer of the Engelwood Police District, he was credited with considerably reducing both crime and racial tension in the district. Because of his success in that district he was transferred to the Central Police District which encompasses the downtown section of the city and is considered one of the most important assignments in the Chicago

Police Department because of the many banks, stores and hotels and dignitaries in the area.

5. After his transfer from the Englewood District, civic and business leaders of the Englewood District selected a committee to personally call upon the then Commissioner of Police, Timothy O'Connor, to return Captain Pape to the Engelwood District. Later, the present Superintendent of Police, Orlando W. Wilson, was approached by civic and business leaders of the Engelwood District to request the return of Captain Pape to the Engelwood District. Plaintiff as a police officer has more creditable mentions and citations to his credit than any other active member of the Chicago Police Department as of this date.

6. Plaintiff returned to the Chicago Police Department in May, 1965 and was assigned Commander of Traffic Area 5.

7. Prior to his leave of absence, plaintiff had never been assigned, trained for or involved with traffic work. There are approximately sixty-six salaried positions in the Chicago Police Department which earn more than plaintiff's present salary of $12,780.00 which is the salary established by the Civil Service for police captains. Among the sixty-six positions are two formerly held by plaintiff; namely, District Commander, which position pays $16,572.00 annually, and Deputy Chief, which position pays $19,152.00 annually.

8. On April 24, 1965, there was published in the New Crusade, a newspaper of general circulation in Chicago, an article about plaintiff, which held him up to ridicule and scorn, wherein the complained of article of defendant was quoted verbatim.

9. On May 1, 1965 there was a demonstration by pickets in front of Chicago Police Headquarters, 1121 South State Street, protesting the reinstatement of plaintiff as a policeman; at said demonstration handbills were passed out which held plaintiff up to ridicule.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—No. 61 C 2202) * *

AMENDED COMPLAINT.

(Filed Nov. 2, 1967)

Plaintiff, Frank Pape, complaining of Time, Incorporated, defendant, alleges:

1. Defendant is a corporation organized under the laws of the State of New York and has its principal place of business in the City of New York in that state.

2. At the time of the commission by defendant of the grievances hereinafter complained of, and for a long time prior thereto, plaintiff, Frank Pape, was a resident of the State of Illinois, having his home and residence in Chicago, Illinois, was employed as Director Security for Chicago Thoroughbred Enterprises, Incorporated, which operates Arlington Park, Washington Park and Balmoral Jockey Clubs in the metropolitan area of the City of Chicago, Illinois, and was on leave from the position of captain of police of the Police Department of the City of Chicago. At aforesaid time, plaintiff was a person of good name, fame and repute, was deservedly held in high esteem by and among his acquaintances and the general public, and deservedly enjoyed the esteem of persons engaged in the profession of police work throughout the United States. The amount in controversy in this case exceeds the sum of $10,000.00, exclusive of interest and costs.

3. Defendant is the owner and publisher of a certain weekly news magazine known as Time.

4. On or about November 24, 1961, defendant maliciously and wrongfully caused to be published and circulated as hereinafter alleged, the following article containing false and defamatory matter concerning plaintiff:

"Dawdling on the Corner

The new paperback book has 307 pages and the simple title Justice. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. Justice carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission.*

* Members of the scholarly panel: Chairman Dr. John A. Hannah, president of Michigan State University; Dr. Robert S. Rankin, chairman of Duke University's political science department; Robert G. Storey, former dean of the Southern Methodist University Law School; Spottswood W. Robinson 3rd, dean of Howard University Law School; Erwin N. Griswold, Dean of Harvard Law School; the Rev. Theodore M. Hesburgh, president of Notre Dame University . . .

* * * * *

Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 officers, ostensibly investigating a murder. The police, says Justice 'broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'. Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

5. For a long time prior to November 24, 1961, plaintiff occupied the position of Deputy Chief of Detectives of the Chicago Police Department. Plaintiff's said position with the Chicago Police Department was known to the general public in the City of Chicago, County of Cook, and State of Illinois. The reference to Detective Frank Pape in aforesaid article in Time was understood by persons reading the article to mean plaintiff. Persons reading the article understood it to mean plaintiff was acting as Deputy Chief of Detectives; further that the other officers referred to in said article were his subordinates, under his direction and control, and that the acts alleged in the article to have been committed by them were committed under the direction and with the approval of plaintiff.

6. Time is a magazine of general circulation distributed and circulated throughout the United States generally, and throughout the free world. Said magazine is circulated and distributed through the State of Illinois and particularly in the City of Chicago and County of Cook in that state. All editions of Time in which the foregoing article appeared were published, circulated and distributed over said area. The actual number of copies of the November 24, 1961 edition of Time and the places of distribution are facts peculiarly within the knowledge and possession of the defendant and are not known exactly to the plaintiff.

7. On or about November 24, 1961, said magazine, published by defendant at Chicago, Illinois, had a weekly circulation of approximately 53,000 in the City of Chicago; a weekly circulation of approximately 92,000 in the County of Cook; and a weekly circulation of approximately 155,000 in the State of Illinois. Its weekly circulation throughout the United States on November 24, 1961 was approximately 2,700,000, and its circulation for the same week, throughout the world, was approximately 2,750,000. Its editorials and news items are extensively copied and commented on by all the leading newspapers, presses, radio

and television stations, and other media of communication in the State of Illinois and elsewhere throughout the United States.

8. The foregoing article was wholly false and libel, per se. In the writing and publication of the foregoing article, defendant meant and was reasonably understood by the reading public as meaning that plaintiff acted in complete disregard of the rights and privileges of James Monroe and his family, in complete violation of any legal process.

9. In the writing and publication of the foregoing article, defendant meant and was reasonably understood by the reading public as meaning that plaintiff committed a crime in that he violated the rights and privileges reserved to James Monroe and his family by the laws of the United States and the State of Illinois, and assaulted James Monroe and members of his family, contrary to the laws of the United States and the State of Illinois.

10. At the time of publication of the foregoing article, the defendant knew, or with the exercise of reasonable care, would have known that the statements concerning plaintiff were false, but defendant failed to exercise reasonable care to ascertain the truth or falsity of such statements by making inquiry of plaintiff or otherwise. In the publication of said article, defendant showed actual malice, spite and ill will toward plaintiff.

11. Had defendant exercised reasonable care to ascertain the truth or falsity of such statements by making inquiry of plaintiff or otherwise, it would have ascertained the following facts:

a) That in addition to plaintiff and the patrolman assigned to him as a driver, on October 29, 1958, there were six detectives not twelve as alleged in the article.

b) That on the night of October 29, 1958, plaintiff took over command of the six detectives only because no sergeant was available. Prior to October 29, 1958 plaintiff had never heard of James Monroe and learned of his pre-

vious record that night. Plaintiff has not seen James Monroe since he placed him in the custody of detectives immediately after his arrest.

c) That the reason for investigating James Monroe was because he had been identified from a photograph on file with the Chicago Police Department by Mrs. Peter Saisi, as one of two men who had shot and killed her husband on October 27, 1958 during the commission of a robbery.

d) That James Monroe had a police record dating back to March 25, 1944. On March 25, 1944 he was sentenced to one year at the National Training School for Boys at Washington, D. C. after conviction of theft from the United States mail at Chicago, Illinois. On March 2, 1945 he was sentenced to the Illinois Training School for Boys until he was twenty-one years of age. On March 3, 1947 he was sentenced to the Illinois State Penitentiary at Joliet, Illinois after conviction of armed robbery. On April 20, 1951 and March 11, 1955 he was arrested by police on suspicion of robbery but released for lack of evidence.

e) That of the six children living with James Monroe on October 29, 1958, four of them, namely Houston Stevens, Robert Stevens, Lawrence Stevens and Jacqueline Stevens were known to the police to have records of law violations as juvenile offenders which included larceny, strong arm robbery, assault, disorderly conduct and malicious mischief.

f) That the investigation at James Monroe's house, 1424 South Trumbull, Chicago, Illinois was conducted at 6:00 o'clock in the morning. Three of the officers were stationed outside the house, five officers, including plaintiff, entered the house.

g) That plaintiff was admitted to the house by a young man of about 14 years of age, and did not, as alleged in the foregoing article, break through two doors.

h) That at the time the police entered, James Monroe was in bed but was clothed. He was ordered to get out of

bed and was immediately given dungarees, shoes and stockings, which he put on.

i) That Mrs. Monroe remained in the bedroom covered with bed clothing until the officers took James Monroe into the living room and then in private put on a robe.

j) That the apartment closets were searched for a number of white shirts taken in the robbery and murder of Peter Saisi. The house was not ransacked as alleged in said article, on the contrary, the officers remained at the apartment for a period of only 15 to 20 minutes.

k) That three of the older children remained in the back of the apartment while the police officers were there, and at no time came into the room where the plaintiff and the other officers were. A two-year-old child of James Monroe, asleep in the living room where the incidents set forth in the Time article allegedly took place, never woke up during all the time plaintiff and the other officers were in the apartment.

l) That at no time were James Monroe or his wife compelled to stand against a wall nude, and at no time was any member of the James Monroe family threatened or abused by plaintiff or his subordinates. That James Monroe, prior to his arrest, had been drinking heavily; there were two empty quart beer bottles and two glasses along side James Monroe's bed; one of the glasses had been overturned and the contents spilled on the floor. There were three empty beer bottles on the side in the kitchen and there was a heavy odor of alcohol on James Monroe's breath. During all the time plaintiff was in the apartment, James Monroe and his children called plaintiff and the other officers vile and insulting names.

m) That James Monroe made no complaint about mistreatment by plaintiff and the men under his command for several months, and that Flossie Monroe, his wife, did not file a personal injury accident report for the alleged assault by plaintiff until August, 1959, some fourteen months later.

12. In the Time article aforesaid, defendant states:

> "Justice carries a chilling text about police brutality in both the South and North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission."

Defendant thereby vouched for the truthfulness of the facts set forth in the article. By reason thereof, defendant showed actual malice, spite and ill will toward plaintiff.

13. The facts stated in said article concerning plaintiff and his subordinates are wholly false and are libelous per se. Defendant thereby transcended the scope and province of fair comment and criticism. The foregoing article charges plaintiff with commissions of a criminal offense and is otherwise asperse of his character which injured his reputation as a police officer and as a member of society.

14. Prior to the publication of the foregoing article in defendant's magazine, plaintiff held positions of command responsibility within the Chicago Police Department. In addition to the position of Deputy Chief of Detectives, plaintiff also held at various times positions of Commander of the Engelwood District and Commander of the Central District of the Chicago Police Department, all of which positions imposed upon plaintiff responsibilities in addition to those normally imposed upon captains of police, and in consideration of such responsibilities, provided plaintiff with salary compensation greatly in excess of that provided by the Civil Service Commission of the City of Chicago for the rank of Captain in the Chicago Police Department.

15. Immediately prior to the publication of defendant's article, plaintiff took a leave of absence from the Chicago Police Department as set forth above.

16. Subsequent to the publication of defendant's article, plaintiff returned to the Chicago Police Department. At the

time of his return and as a direct and proximate result of defendant's complained of article, there was a demonstration by persons at the headquarters of the Chicago Police Department, which had for its purpose heaping scorn and ridicule upon the plaintiff.

17. Moreover, as a direct and proximate result of defendant's complained of article, plaintiff has been assigned to a post in the Chicago Police Department far below the status and rank which he enjoyed at the time of his leave of absence. Plaintiff is now assigned as Commander of a traffic area from which he derives a salary of approximately $12,500.00, which is the salary provided for captains by the Civil Service Commission of the City of Chicago. There are approximately sixty positions in the Chicago Police Department which pay a higher rate of return than that now earned by the plaintiff. Among those positions are Deputy Chief of Detectives and District Commander, both of which positions plaintiff formerly held. Solely by reason of defendant's article, plaintiff has been barred from those positions which he formerly held or positions of commensurate reward and responsibility which would have normally been given to him.

18. Subsequent to the publication of the foregoing article in defendant's magazine, plaintiff had been asked by numerous persons whether the facts therein set forth are true. As a direct result of the article, plaintiff has been shunned by his former friends, his reputation and character have been questioned, injured and exposed to public hatred, contempt and ridicule, and his honesty, integrity and reputation have been injured.

19. The statements in said article concerning plaintiff were and are wholly false, and by reason of the publication thereof, plaintiff has been defamed and has suffered and will suffer loss of income by reason of being barred from

positions of employment within his chosen profession. Moreover, plaintiff has suffered great anguish, public hatred, contempt, ridicule and disrepute among his fellow employees, acquaintances and the general public, and his integrity, virtue and reputation have been impeached and questioned, all to his damage in the sum of One Hundred Thousand Dollars ($100,000.00).

20. By reason of the foregoing, defendant ought to be compelled to pay Two Hundred Fifty Thousand Dollars ($250,000.00) as punitive damages.

Wherefore, plaintiff demands judgment against defendant for the sum of One Hundred Thousand Dollars ($100,000.00) actual damages, and the further and addition sum of Two Hundred Fifty Thousand Dollars ($250,000.00) exemplary damages, and for his costs.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—No. 61 C 2202) * *

ANSWER TO AMENDED COMPLAINT.

(Filed Nov. 16, 1967)

Now comes the defendant, Time, Incorporated, by its attorneys and in answer to plaintiff's amended complaint in the above-captioned cause:

1. (Alleges defendant's New York citizenship.) Defendant admits the allegations of Paragraph 1.

2. (Alleges plaintiff's Illinois citizenship, employment at Chicago Metropolitan Racetracks and Chicago Police Department and plaintiff's reputation; alleges that the amount in controversy exceeds $10,000.00.) Defendant admits the allegations of plaintiff's Illinois citizenship and racetrack employment but is without knowledge or

information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 2 of the complaint.

3. (Alleges defendant's ownership of Time Magazine.) Defendant admits the allegations of Paragraph 3 of the complaint.

4. (Alleges malicious and wrongful publication of a news article on November 24, 1961.) Defendant admits the allegation of Paragraph 4 that defendant published a news article containing the language set forth in the quotation in said Paragraph 4; defendant denies that the language set forth in Paragraph 4 is the complete text of the said news article; defendant denies that the said news article was published maliciously or wrongfully and further denies that the said news article contains any false or defamatory matter.

5. (Alleges the position of plaintiff as Deputy Chief of Detectives of the Chicago Police Department, the general public's knowledge of plaintiff's position and that other officers referred to in defendant's article were plaintiff's subordinates.) Defendant admits the allegations of Paragraph 5 of the complaint that on November 24, 1961, the plaintiff Pape held the position of Deputy Chief of Detectives of the Chicago Police Department, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 5.

6. and 7. (Alleges Time Magazine's nationwide distribution and prominence and alleges circulation totals for the areas of Chicago, Cook County, and Illinois.) Defendant admits the allegations of Paragraphs 6 and 7 of the complaint.

8. (Alleges that the article was false and libelous, and that readers so interpreted it.) Defendant denies the allegations of Paragraph 8 of the complaint and alleges that the article speaks for itself.

9. (Alleges that defendant meant and readers understood the article as meaning that plaintiff committed a crime in assaulting the civil rights of James Monroe and his family.) Defendant denies the allegation of Paragraph 9 of the complaint and alleges that the article speaks for itself.

10. (Alleges that defendant knew or should have known that the statements concerning plaintiff were false and that defendant failed to exercise reasonable care to ascertain the truth or falsity of such statements; alleges actual malice, spite and ill will.) Defendant denies the allegations of Paragraph 10 of the complaint.

11. (Alleges that defendant could or should have ascertained certain facts prior to publication.) Defendant denies the allegations of Paragraph 11 of the complaint.

12. (Alleges that defendant vouched for the truth of the facts set forth in the article; realleges defendant's actual malice, spite and ill will towards plaintiff.) Defendant admits that the aforesaid Time news article contains the language set forth in Paragraph 12 of the complaint, and denies all of the remaining allegations of Paragraph 12.

13. (Realleges that the news article is false and libelous and alleges that the article transcends the scope of fair comment and criticism.) Defendant denies the allegations of Paragraph 13 of the complaint.

14. (Alleges plaintiff's prior positions and duties with the Chicago Police Department.) Defendant does not dispute the allegations of Paragraph 14 of the complaint but defendant denies that said allegations have any materiality or relevancy to this case.

15. (Alleges plaintiff's leave of absence from the Chicago Police Department immediately prior to defendant's publication.) Defendant admits the allegation of Paragraph 15 of the complaint.

16. (Alleges that plaintiff returned to the Police Department and that there was a demonstration against him at that time as a direct and proximate result of the news article.) Defendant admits that plaintiff returned to the Police Department but denies the remaining allegations of Paragraph 16 of the complaint.

17. (Alleges that plaintiff was assigned to an inferior position in the Chicago Police Department as the direct, proximate and sole result of defendant's news article.) Defendant denies the allegations of Paragraph 17 of the complaint.

18. (Alleges plaintiff's general loss of reputation and friends as a result of the Time article.) Defendant denies the allegations of Paragraph 18 of the complaint.

19. (Alleges plaintiff's loss of reputation and potential opportunities due to defendant's news article and alleges damages in the sum of $100,000.00.) Defendant denies the allegations of Paragraph 19 of the complaint.

20. (Alleges that defendant should suffer punitive damages of $250,000.00.) Defendant denies the allegation of Paragraph 20 of the complaint.

First Defense.

The plaintiff is entitled to no recovery because the defendant's news article is a protected exercise of the unconditional right to publish the truth as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Constitution of the State of Illinois.

Second Defense.

The plaintiff is entitled to no recovery because the plaintiff, as Deputy Chief of Detectives of the Chicago Police Department, was a public official and the defendant's news

article was not published with actual malice; the said news article is accordingly non-actionable under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Constitution of the State of Illinois.

THIRD DEFENSE.

The plaintiff is entitled to no recovery because the defendant's news articles did not cause the plaintiff any special damages; the plaintiff's income and wealth in fact greatly increased after publication of the said news article.

FOURTH DEFENSE.

The plaintiff is entitled to no recovery because the defendant's news article is a protected exercise of the right to report the activities and utterances of governmental officials and bodies.

FIFTH DEFENSE.

The plaintiff is entitled to no recovery because the defendant's news article is a protected exercise of the right to comment upon matters of public interest and concern.

SIXTH DEFENSE.

To penalize the defendant with punitive damages in this action would violate constitutional criminal rights and safeguards guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Wherefore, having fully answered the complaint, defendant prays that the plaintiff take nothing by his suit and that the defendant be discharged, with its costs.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—No. 61 C 2202) * *

REPLY TO AMENDED ANSWER.

(Filed Jan. 4, 1968)

Now comes plaintiff, Frank Pape, by his attorneys, John M. Kaveny and Luis Kutner, and replying to the Amended Answer filed in the above entitled cause, says:

1. Replying to the first defense of the defendant, denies that the complained of news article is protected under the first or fourteenth amendments or any other provision of the United States Constitution, or any provision of the Constitution of the State of Illinois.

2. Replying to the second defense of the defendant, denies that the complained of article was published without malice, and on the contrary, alleges that said article was published either with actual malice or with a reckless disregard by defendant or its agents as to whether the material in said article was true or false.

3. Replying to the third defense of the defendant, denies defendant's allegations that plaintiff has sustained no special damages, and on the contrary, alleges that plaintiff has sustained substantial and material damages, both by loss of income and otherwise as a direct and proximate result of the publication of the complained of article by defendant. Further, denies that plaintiff's income and wealth was greatly increased after the publication of said article, and on the contrary, alleges that his income and wealth has greatly diminished by reason thereof.

4. Replying to the fourth defense of the defendant, denies that the complained of article is a protected exer-

cise of the right to report the activities or utterances of governmental officials or bodies, and on the contrary, alleges that said article was not the report of the activities or utterances of governmental officials or bodies, but an inaccurate and false report of a governmental publication.

5. Replying to the fifth defense of the defendant, denies that the complained of article is a protected exercise of the defendant's right to comment upon matters of public interest or concern.

6. Replying to the sixth defense of the defendant, denies that the imposition of punitive damages in this cause would violate any constitutional protections accorded to defendant, either by the United States Constitution or the Constitution of the State of Illinois, and on the contrary, alleges that punitive damages have long been a settled form of compensation in matters of this type.

Wherefore, plaintiff demands judgment as set forth in his Amended Complaint.

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—No. 61 C 2202) * *

STIPULATION OF FACTS.

PART I—LIABILITY.

1. The plaintiff, Frank Pape, also known as Francis W. Pape, is employed by the Chicago Police Department, holds the permanent Chicago Civil Service rank of Captain of Police, and resides at 1911 Prospect Avenue in Park Ridge, Illinois.

2. Plaintiff is married to Catherine Pape.

3. Defendant, Time, Incorporated, is a corporation or-

ganized under the laws of the State of New York and has its principal place of business in the City of New York in that state.

4. On November 24, 1961, plaintiff Pape was employed as Director of Security for Chicago Thoroughbred Enterprises, Incorporated, which operates the race tracks known as Arlington Park, Washington Park and Balmoral Jockey Club in the metropolitan area of Chicago. On November 24, 1961, plaintiff was on leave of absence from the position of Captain of Police of the Chicago Police Department.

5. Plaintiff became a policeman in March 1933 and continued in that employment until April 15, 1991 when he was employed full time by the above-named race tracks.

6. Plaintiff was a patrolman from 1933 to 1942. He worked as a detective with the State's Attorney's Office of Cook County from 1933 through 1937. In 1939 plaintiff was transferred to the detective bureau and thereafter was assigned to the robbery detail, where he worked until 1959. In 1942 he was promoted to sergeant. In 1952 he was promoted to lieutenant.

7. For a short time after his promotion to lieutenant, plaintiff was assigned to the First Police District of Chicago and thereafter returned to the Detective Division as head of the Robbery Detail. Most of his career was with the Robbery Detail.

8. Plaintiff was promoted to Deputy Chief of Detectives in 1957. He remained Deputy Chief of Detectives for two years. He was promoted to Captain in 1959 and assigned as commander to the Engelwood or 15th Police District for a period of five months. In February 1960 plaintiff was assigned to be the First District Commander and remained there until he was granted a leave of absence in April 1961. On April 15, 1961 he entered into an employment contract with Chicago Thoroughbred Enterprises, Inc. for a period of four years at an annual salary

of $25,000.00 plus bonus. This contract by its terms expired on April 15, 1965.

9. In October, 1958, Pape was Deputy Chief of Detectives of the Chicago Police Department. On October 29, 1958, Pape reported for duty at the Chicago Police Headquarters at 11th and State Streets at approximately 12:01 a.m.

10. Prior to daylight on the morning of October 29, 1958 Pape was in charge of a squad of seven detectives who went to the apartment of James Monroe and his family at 1424 South Trumbull, Chicago, Illinois. None of the men in the squad, including Pape, were in police uniform. All of the men in the squad were white, i.e., Caucasian. The policeman in the squad were subject to the supervision and control of Pape; Pape was the highest ranking police officer in the squad.

11. On the morning of October 29, 1958 the following occurrences or events transpired at the apartment of James Monroe:

a. Pape and four police officers entered the Monroe apartment at approximately 6:00 a.m.; three other police officers stood guard outside.

b. Mr. and Mrs. James Monroe and six children were in the apartment.

c. Pape was armed with a revolver.

d. Pape entered the bedroom of James Monroe and his wife.

e. When Pape entered the bedroom of Mr. and Mrs. Monroe the bedroom light was off, Mr. and Mrs. Monroe were in bed, and Pape shined his flashlight on Mr. and Mrs. Monroe.

f. James Monroe was required to leave his bed and go into the living room.

g. Pape searched the closet in the Monroe's bedroom.

h. During the time the police officers were in the Monroes' apartment, police officers searched all the rooms in the apartment, and James Monroe was arrested.

12. James Monroe was thereafter required to leave his apartment. After leaving the Monroe apartment:

a. James Monroe was handcuffed.

b. James Monroe was placed in an unmarked police car with several policemen, including Pape.

c. James Monroe was taken by police officers, not including Pape, to Chicago Police Headquarters at 11th and State Streets.

13. After being held at police headquarters at 11th and State Streets for approximately ten hours, James Monroe was released from police custody.

14. No criminal charges were ever lodged against James Monroe after his arrest and detention as above described on October 29, 1958.

15. In November, 1961 the official 1961 Annual Report of the U. S. Commission on Civil Rights was issued and published. The U. S. Commission on Civil Rights was created by Act of Congress in 1957 for the purpose of investigating civil rights problems and to report the results of the investigations to the President of the United States and to Congress.

16. Volume 5 of the Civil Rights Commission's official 1961 Annual Report was entitled Justice. Defendant's Exhibit E is a true copy of excerpts from the said Volume 5 entitled Justice.

17. Prior to the preparation and publication of the U. S. Commission's Volume 5 entitled Justice, staff members of the Commission made field trips for the purpose of investigating police brutality in a number of cities in the United States. An attorney employed on the staff of the

Commission, Mr. Richard Wolf, traveled to Chicago, Illinois in late January or early February of 1961; Mr. Wolf spent five or six working days in Chicago.

18. Before coming to Chicago, Mr. Wolf had never heard of Frank Pape or the case of Monroe v. Pape.

19. The article of which the plaintiff, Frank Pape, complains in this suit appeared in the November 24, 1961 issue of Time magazine. Defendant's Exhibit F is a true copy of the complete text of the article.

20. The article of which plaintiff complains was written by Edward F. Magnuson, Contributing Editor assigned to the National Affairs section of Time magazine. At the time the article was written, Mr. Magnuson's supervising editor was Mr. Champ Clark, Editor of the National Affairs section of Time magazine.

21. Justice, Volume 5 of the Official 1961 Report of the U. S. Commission of Civil Rights, was officially published and released on or about November 17, 1961. Simultaneously with the public issuance of Justice, the U. S. Commission on Civil Rights also issued a Press Release concerning the Justice Report; defendant's Exhibit G is a true and correct copy of the said Press Release.

22. On November 17, 1961 the New York Times Newspaper published a lengthy news article concerning the issuance and release of Justice; defendant's Exhibit H is a true and correct copy of the said news article in the New York Times concerning Justice.

23. At the time Mr. Magnuson wrote the Time news article concerning Justice, he had read the Justice Report in full, the Press Release issued by the U. S. Commission concerning Justice (defendant's Exhibit G), and the news article in the New York Times of November 17, 1961 (defendant's Exhibit H).

24. After Mr. Magnuson had written the article, the article was sent to Mr. Champ Clark as Editor of the National Affairs Section of Time. The article was then

transmitted to the Research Department of Time. The supervisor of research assigned the article to a Time staff researcher, Miss Karen Burger (now Mrs. Karen Booth). Miss Burger was first employed by Time, Inc. in 1954 and was continuously so employed until April 1, 1966 when she took a maternity leave of absence. She has not yet rejoined the staff of Time.

25. As researcher, Miss Burger's job was to check the factual accuracy of the article. Time maintains an informational reference library, commonly called the "morgue," which is arranged alphabetically according to names of individuals and subject matter.

26. In the performance of her duties as researcher, Miss Burger obtained from the Time "morgue" all the materials therein concerning Frank Pape and the Case of Monroe v. Pape. The said materials that Miss Burger obtained and examined were as follows:

a. A news article in the New York Post by Fletcher Martin published February 27, 1961 bearing the headlines "The Suit Against the Chicago Cops" and "A Father Recalls His Night of Terror." Defendant's Exhibit I is a true copy of said news article.

b. A report from Time's Chicago Bureau written by Dudley Doust, Chicago correspondent for Time, entitled "A Kicked in Door" and received by Time in New York on February 22, 1961. Defendant's Exhibit J is a true copy of said report.

c. A report from Time's Washington Bureau written by Burt Meyers, Washington correspondent for Time, entitled "Supreme Court" and received by Time in New York on February 22, 1961. Defendant's Exhibit K is a true copy of said report.

d. A proposed article written by Time correspondent Dudley Doust in Chicago entitled "Terror on

Trumbull Street" and received by Time in New York on February 21, 1960. Defendant's Exhibit L is a true copy of said article.

e. A proposed article from the Washington Bureau of Time entitled "The Supreme Court—Another Monroe Doctrine" and received by Time in New York on February 20, 1961. Defendant's Exhibit M is a true copy of said article.

f. A report entitled "Chicago Cop" from the Chicago Bureau of Time from a Time correspondent named Heinke received by Time in New York on May 24, 1951. Defendant's Exhibit N is a true copy of said report.

g. A newspaper clipping dated December 21, 1947 bearing the headline "This Dead-Eye Dick Poisoned Two Hoodlums." Defendant's Exhibit O is a true copy of said clipping.

h. An article from the New York Times dated February 21, 1961 by Anthony Lewis, with the headline "High Court Backs Suing of Police." Defendant's Exhibit P is a true copy of said article.

27. In addition to the above-listed materials, Miss Burger in researching the contents of the article also examined and read the materials that Mr. Magnuson had referred to when writing the story, i.e., the Justice Report, the U. S. Commission Press Release concerning Justice (Defendant's Exhibit G), and the article in the New York Times newspaper dated November 17, 1961 (Defendant's Exhibit H).

28. After reading and examining all of the above materials, Miss Burger then returned the article to Mr. Magnuson.

29. At the time of the publication of the article complained of, the plaintiff, Frank Pape, did not know any of the officers, reporters or other employees of defendant, Time, Inc.

30. The duty of the Robbery detail of the Police Department was to investigate robberies that might be considered serious or where the cases were numerous or where amounts taken were large or where there was injury to the person.

31. James Monroe was ordered arrested by Sergeant Edward Cagney because his photographs had been identified by Mrs. Mary Saisi as resembling one of the two men who had allegedly entered her home on October 27, 1958, allegedly shot and killed her husband, Peter Saisi, and allegedly stole a quantity of shirts from the house.

32. Plaintiff had spoken with Mrs. Saisi on October 27, 1958 during his investigation of the alleged robbery and murder, and had obtained a description of the robbers from her. That description included a description of a tall Negro man.

33. Subsequently, after the arrest of James Monroe, Mrs. Saisi confessed that she and another man had killed her husband; Mrs. Saisi and the other man were convicted and sentenced to the penitentiary.

34. Mrs. Saisi falsely told Pape that a Negro robber shot her husband, and the description she gave resembled that of James Monroe.

35. As Deputy Chief of Detectives, plaintiff would not have been on the detail that arrested James Monroe on October 29, 1958. There was no sergeant available to supervise the detail making the arrest, and the plaintiff went to provide supervision.

Stipulated and Agreed:

/s/ JOHN M. KAVENY,
Attorney for Plaintiff.

/s/ LAWRENCE GUNNELS,
Attorney for Defendant.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—No. 61 C 2202) * *

FINAL PRETRIAL ORDER.

This matter having come before the Court at a pretrial conference held pursuant to Rule 16 of the Federal Rule of Civil Procedure, 28 U. S. C., and John M. Kaveny and Luis Kutner having appeared as counsel for the plaintiff; and Don H. Reuben, Lawrence Gunnels and Michael W. Coffield of Kirkland, Ellis, Hodson, Chaffetz & Masters having appeared as counsel for the defendant, the following action was taken:

NATURE OF ACTION AND JURISDICTION.

This is an action for damages for libel. The jurisdiction of the Court is not disputed.

The following stipulations and statements were submitted, attached to, and made a part of this order:

(a) A comprehensive written stipulation or statement of all uncontested facts;

(b) A written list or lists of the potential witnesses to be called by each party;

(c) An agreed statement of the contested issues of fact and of law;

(a) A list of all depositions to be read into evidence and statements of any objections thereto;

The foregoing were modified at the pretrial conference as follows:

PLAINTIFF.

The following exhibits were offered by the plaintiff and marked for identification. There was reserved to the defendant the right to object to their receipt in evidence on the grounds stated:

Exhibit 1—Article appearing in New Crusade, a newspaper, dated April 24, 1965

Exhibit 2—Handbill of demonstrators passed out at demonstration of May 1, 1965

Exhibits 3, 4, 5, 6, 7, 8, 9 and 10—Photographs of demonstration of May 1, 1965.

DEFENDANT.

(A)

The following exhibits were offered by the defendant, received in evidence, and marked as herein indicated:

Exhibit E—Excerpt from Volume 5, 1961 Civil Rights Commission

Exhibit F—Article appearing in defendant's magazine dated November 24, 1961

Exhibit G—Press release dated November 17, 1961

Exhibit H—Article in New York Times, a newspaper dated November 17, 1961.

(B)

The following exhibits were offered by the defendant, marked for identification, and admitted into evidence over the objection of plaintiff:

Exhibit I—Article in New York Post, a newspaper dated December 27, 1961

Exhibit J—Report of Time correspondent dated February 22, 1961

Exhibit K—Report by Time correspondent dated February 22, 1961

Exhibit L—Report by Time correspondent dated February 21, 1960

Exhibit M—Report by Time correspondent dated February 20, 1961

Exhibit N—Report by Time correspondent dated May 24, 1961

Exhibit O—Report by Time correspondent dated December 21, 1947

Exhibit P—Article in New York Times dated February 21, 1961.

(C)

The following exhibits were offered by the defendant and marked for identification. There was reserved to plaintiff the right to object to their receipt in evidence on the grounds stated:

Exhibit Q—Article in Chicago's American, a newspaper dated December 4, 1962

Exhibit R—Article in Chicago Tribune, dated December 5, 1962

Exhibit S—Article in Chicago's American dated December 5, 1962

Exhibit T—Article in Chicago Daily News dated December 12, 1962.

LIMITATIONS AND RESERVATIONS.

(A)

There is reserved to each of the parties the right to call such rebuttal witnesses as may be necessary, without prior notice thereof to the other party.

(B)

The probable length of trial is 4-5 days. The case will be listed on the trial calendar, to be tried when reached.

It Is Ordered that this pretrial order may be modified at the trial of the action, or prior thereto, to prevent manifest injustice. Such modification may be made either on application of counsel for the parties or on motion of the Court;

It Is Further Ordered that requests for instructions shall be submitted to the trial court at the commencement of the trial, but there is reserved to counsel for the respective parties the right to submit supplemental requests for instructions during the course of the trial or at the conclusion of the evidence on matters that cannot reasonably be anticipated.

/s/ Edwin A. Robson,
Judge.

Date: Sept. 10, 1968.

Approved as to Form and Substance.

/s/ John M. Kaveny,
Attorney for Plaintiff.

/s/ Lawrence Gunnels,
Attorney for Defendant.

Attachment A to Final Pretrial Order.

The plaintiff will read into evidence the deposition of Karen Booth, the deposition of Edward F. Magnuson and the deposition of Champ Clark.

[4] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—Docket No. 61 C 2202) * *

Before Hon. Edwin A. Robson, Judge, and a jury.

Monday, January 13, 1969,
2:00 o'clock p.m.

Met pursuant to adjournment.

Present:

Mr. Kaveny, appeared for Plaintiff;

Mr. Reuben, appeared for Defendant.

(Whereupon, the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

[5] (Counsel for plaintiff thereupon made an opening statement to the jury.)

(Counsel for the defendant thereupon made an opening statement to the jury.)

[6] The Court: You may call your first witness.

Mr. Kaveny: Take the stand, sir.

The Clerk: Raise your right hand, please.

(The witness was thereupon duly sworn.)

The Court: Conduct the examination from the podium, please, Mr. Kaveny.

Mr. Kaveny: Yes, sir.

The Court: For the benefit of both sides, please try to avoid as much repetition as possible of any of the facts that have been stipulated to.

Mr. Kaveny: I will try, sir.

The Court: All right.

EDWARD CAGNEY, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. State your name and address, sir.

[7] A. Edward Cagney, 1214 South 61st Avenue, Cicero, Illinois.

Mr. Youker (Offical Court Reporter): Will you spell your last name, please.

The Witness: C-a-g-n-e-y.

By Mr. Kaveny: Q. What is your occupation, Mr. Cagney?

A. I work for security, for private industry.

Q. In October of 1958, by whom were you employed?

A. The City of Chicago.

Q. In what capacity, sir?

A. I was a Sergeant of the Department of Police, assigned to the Homicide Section.

Q. Directing your attention, sir, to October 27, 1958, did you have occasion to participate in an investigation of a complaint by a Mrs. Saisi?

A. Yes, sir.

Q. What did Mrs. Saisi relate to you as to what had transpired?

A. On that particular night her husband was shot and killed by two men, she said, that were colored men.

[8] One was a big, tall man, and the other was just a little shorter, about two inches shorter than the original man, and she figured that the tall man was about six foot two.

[9] Q. Was Captain Pape involved in that investigation?

A. I don't think so. I don't recall. I don't think so.

Q. Was Mrs. Saisi, in the course of the investigation, brought to the police station?

A. Not that particular night, she wasn't.

Q. On October 28, 1958, was she brought to the police station?

A. She was brought into the Detective Bureau.

Q. What was the purpose that she was brought in?

A. She was brought in by Detective Neil Carr, to view pictures in the B. of I.

Q. Did she do so?

A. Yes, sir.

Mr. Reuben: I object, unless this officer was there.

The Court: What is that?

Mr. Reuben: I object, unless this officer was present.

The Court: All right. Lay the foundation.

Mr. Kaveny: All right. I will withdraw the question, your Honor.

The Court: All right.

[10] By Mr. Kaveny: Q. Was a picture given to you—

A. Yes, sir.

Q. —on October 28, 1958?

A. Yes.

Q. By whom?

A. Detective Neil Carr, assigned to the Homicide Section.

Q. Whose likeness was the picture?

Mr. Reuben: I object. The picture speaks for itself, your Honor. It is the best evidence.

The Court: Do you have it, for the purpose of identification?

Mr. Kaveny: I do not have the picture, no, your Honor.

The Court: All right.

Mr. Kaveny: Just a moment. I do not believe I have it with me.

(There was a short interruption, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

[11] By Mr. Kaveny: Q. Was a record given to you at the same time by the sergeant?

A. Yes.

Q. Or rather, by the detective?

A. Yes.

Q. Was this as a result of his conference with Mrs. Saisi?

A. That the detective had with Mrs. Saisi, yes.

Q. As a result of that, did you issue any orders?

A. Yes, sir.

Q. What orders did you issue?

A. Detective Neil Carr told me that Mrs. Saisi—

Mr. Reuben: Just a moment. I object and move that the answer be stricken. The question was what orders did he give, and he is now, I believe, giving hearsay testimony as to what somebody else told him.

The Court: The objection is sustained. When you make an objection, stand up, Mr. Reuben.

Mr. Reuben: I am sorry.

By Mr. Kaveny: Q. As a result of the photograph [12] and of the report given to you by Officer Neil Carr, what orders did you give?

A. I gave the picture and the record to Detective Howard Felker, who is now deceased, to arrange to pick up the gentleman whose picture I had.

[13] Q. What was that name, sir?

A. James Monroe.

Q. What was his address?

A. It was in the 1400 block south on St. Louis.

Q. Did you issue any further orders with regard to that arrest?

A. I told Detective Felker, I said, "If you pick up James Monroe, put him in the Detective Bureau lockup and notify our lieutenant, James McMahon, on days, to have Mrs. Saisi come in and view him at a show-up."

Q. Was there a sergeant in charge of that arrest?

A. At the time that James Monroe was arrested?

Q. Yes, sir.

A. There was no sergeant on the midnight. I was the sergeant on the four-to-twelve and the sergeant on the midnight on that particular night was off.

Q. Who was that sergeant?

A. That was Sergeant William Clark.

Q. Was there anyone besides the Deputy Chief [14] of Detectives in charge that evening?

A. Not in the Homicide Section, no.

Q. Who was the Deputy Chief of Detectives at that time?

A. Frank Pape.

Q. What were his hours of duty on October 29?

A. From midnight till eight in the morning.

Mr. Kaveny: No further questions.

The Court: You may cross-examine.

Cross-Examination by Mr. Reuben.

Q. Officer Cagney, did you participate in any way in the raid?

A. No, sir.

Mr. Kaveny: Your Honor, may I be heard for just a moment on the use of the word "raid"? It was an arrest. A raid connotes a gambling raid or something like that. It was an arrest.

The Court: All right. Use the word "arrest", Mr. Reuben.

[15] By Mr. Reuben: Q. Was a search warrant ever procured for the searching of the house of James Monroe?

A. No, sir.

Mr. Kaveny: Objection.

The Court: He may answer, if he knows.

By the Witness: A. No, sir.

By Mr. Reuben: Q. Could you tell the jury how you would get a search warrant?

Mr. Kaveny: Objection.

The Court: Objection sustained.

By Mr. Reuben: Q. Were you a defendant in the case of Monroe versus Pape?

A. Yes, sir.

Mr. Kaveny: Objection, your Honor.

The Court: He may answer. Objection overruled.

By Mr. Reuben: Q. Were you found guilty of violat- any of the Monroe family's civil rights?

[16] Mr. Kaveny: Objection.

The Court: Objection overruled.

By the Witness: A. I didn't violate their rights. I was fined $2,000, but I didn't violate their rights.

By Mr. Reuben: Q. You were fined $2,000 by this Court, correct?

A. Yes, by Judge Parsons' court.

Mr. Reuben: Thank you.

[17] The Court: Is there any redirect?

Mr. Kaveny: Yes, your Honor.

Redirect Examination by Mr. Kaveny.

Q. Sergeant Cagney, when you say "fine", that was damages assessed against you by a jury, is that right?

A. That's right.

Q. That was not a fine in the sense of a criminal fine?

A. It wasn't a fine. It was a suit.

Q. A civil suit?

A. They were awarded $2,000.

Q. In damages.

Mr. Kaveny: No further questions.

The Court: Is there any recross?

Mr. Reuben: No, your Honor.

The Court: All right. Thank you, sir. You are excused.

(Witness excused.)

The Court: You may call your next witness.

(There was a short interruption, after which the following further proceedings were had, to-wit:)

[18] JOHN HIGGINS, called as a witness by the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. Will you state your name, sir.

A. John Higgins.

Q. What is your occupation, sir?

A. Police officer.

Q. How long have you been a police officer?

A. Since August, 1942.

Q. What is your rank in the Police Department at the present time?

A. Sergeant.

Q. Directing your attention to October of 1958, were you assigned to the Homicide Division?

A. Yes, sir, I was.

Q. What was your rank at that time, sir?

A. Detective.

Q. Directing your attention to the morning of October 29, 1958, did you have occasion to participate in the arrest of one James Monroe?

A. Yes, sir.

[19] Q. I ask you to go back and tell me what occurred that morning—strike that.

I ask you to go back, sir, and tell me what time you went on duty that morning.

A. I was working the twelve to eight watch, and I arrived at work, it would be the evening of the 28th, possibly between 11:15 and 11:30 p.m.

Q. Would you tell us what you did, sir, prior to this arrest but regarding this arrest?

A. When I arrived for work the evening of the 28th I met my partner, Howard Felker, and Detective Felker told me at that time that we were working on a homicide case that had happened the day before.

Mr. Reuben: Your Honor, I would move that what Detective Felker stated be stricken. He is dead and I cannot cross-examine him.

Mr. Kaveny: There is only one thing, as the transcript will show, he has not related any conversation as far as Detective Felker is concerned.

The Court: Objection overruled at this time.

Mr. Reuben: I think he said that Detective Felker [20] said something.

Mr. Kaveny: He started to and then stopped.

The Court: There will be no conversation. Address your remarks to the Court.

Mr. Kaveny: Would the reporter please read the last few remarks of the witness.

A. (Read by reporter.)

Mr. Reuben: I would move that that be stricken, your Honor.

The Court: It may stand for whatever it is worth.

By Mr. Kaveny: Q. What was the homicide case that you were working on, sir?

A. It was a case of Mr. Saisi, who had been murdered in his home the evening of the 27th, October 27th.

Q. Now, you arrived at the station house on the evening of the 28th, and you were going to tell us what you did

with regard to this arrest prior to that in the early morning hours of October 29th.

A. Right.

Q. Would you tell us, please.

[21] A. Detective Felker showed me a picture of one James Monroe and also his police record, and stated, he told me that Mr. Monroe—

Mr. Reuben: Your Honor—

The Court: Do not state what he said.

By the Witness: A. I learned that Mr. Monroe had been identified as having been one of the two persons who had murdered Mr. Saisi the night before.

By Mr. Kaveny: Q. Were you given any directions or orders at that time?

A. Yes. We spoke to Chief Pape. This particular evening we didn't have anybody in charge of the Homicide. Our sergeant was off that night, and our immediate superior would have been Chief Pape, so we spoke to Chief Pape and he suggested that we go out to the home or the place of residence, survey the building, and determine what type of premises it was, and convey this news to him.

Q. Did you do that?

A. He also told us that if he weren't busy throughout the night he would meet us throughout the night [22] when we were about to make the arrest.

Q. Did you go out and survey the apartment?

A. Yes, sir, I did.

Q. And report back?

A. Yes, sir, I did.

Q. About what time was the arrest made?

A. Around daybreak, that would be.

Q. Prior to that time did you meet with Captain Pape and other police officers?

A. Yes, sir, I did.

Q. Where did you meet with them?

A. On Roosevelt Road near Trumbull. I think it was St. Louis.

Q. What time was that, sir?

A. Around 5:30, I think it was, that morning.

Q. Can you tell me what police officers besides yourself, your partner Howard Felker, and Captain Pape, you met at that hour and place?

A. The two other homicide cars working that evening. One car had Detective Frank McMahon and, I think, [23] his partner—I'm not certain now—I think his partner that evening was Detective Gerald Sullivan. The other car, I believe, was Detective Conway and Detective Pruneckle.

Q. What did you do after you met with these people?

A. We went to 1424 South Trumbull Street.

Q. Would you describe in detail what occurred there, sir?

A. Yes. There Chief Pape assigned us to our posts. My post was at the back door with Detective Felker and Detective Gerald Sullivan, Chief Pape and his chauffeur, who is Detective Jerry Sullivan, not related to the other Gerald Sullivan.

Q. Where were the remaining officers placed?

A. There was one detective, I'm not certain which one, was in the back, around the back yard. There was one around the front door. This is outside, now.

Q. Yes.

A. I don't know where the others were.

[24] Q. Did you enter the premises with Captain Pape?

A. Yes, sir, I did.

Q. What did you observe Captain Pape doing prior to the time that you went to the premises?

A. Pardon?

Q. What did you observe Captain Pape do prior to the time you went to the Monroe premises, immediately prior, I should say.

Strike that.

How did Captain Pape and the rest of you gain entrance?

A. We went to the back door where Chief Pape knocked on the back door.

Q. What happened?

A. After a short while, a light went on inside the apartment. There is a small window in his back door, and we could see a colored boy, maybe about 15 or 16 years old. He came to the door and opened it. Chief Pape asked him if James Monroe lived there. The boy said yes.

[25] Q. What happened then?

A. Chief Pape and his chauffeur, Detective Jerry Sullivan, went into the apartment. He told us to wait there.

Q. To wait, meaning where, sir.

A. At the back door.

Q. All right. Then what happened?

A. About two minutes later a light went on toward the front part of the apartment. At the back door we could see through this window, and there was a hallway leading toward the front, and a light went on in the front part of the apartment and Chief Pape beckoned to us to come in.

Q. All right. What did you find when you went into the apartment?

A. I walked through this hallway to the front room. Mr. Monroe was standing in the center of the front room. Chief Pape asked me to stand guard with him.

Q. Was any other police officer with Mr. Monroe at that time?

A. No. Along with me, Detective Jerry Sullivan [26] came in, and the two of us were asked to stand guard.

Q. How was Mr. Monroe dressed at that time?

A. He had a white T-shirt and a pair of shorts on.

Q. Was he given any other clothes?

A. Yes. Just about that time Detective Jerry Sullivan came out of the bedroom and he was holding a pair of—

they looked like overall pants, maybe with paint or some kind of white stuff all over the pants.

Q. The second Jerry Sullivan you are referring to is the Deputy Chief of Detectives' chauffeur, is that right?

A. Yes, sir. That's right.

[27] Q. What happened after that, if you recall?

A. Well, there was a lot of yelling and screaming. There were four or five children running around the house, calling us all sorts of profane names. There was a lot of noise.

Q. Did Mr. Monroe say anything to you at that time?

A. No, he didn't.

Q. Did Captain Pape in your presence say anything to Mr. Monroe at that time?

A. No, he did not.

Q. Was Mr. Monroe then removed from the premises?

A. Yes. We were there possibly five to ten minutes, and at that time—he said he wanted to change his clothes, but he had a pair of pants on and Detective Jerry Sullivan gave him a jacket to put on. It was a chilly evening.

We then went outside of the apartment, and outside of the apartment he was handcuffed and brought to the squad car.

Q. Did you take him to the station?

A. No. One of the other squads did.

[28] Q. One of the other squads took him to the station?

A. Yes.

Q. Did you have occasion to see Mr. Monroe thereafter in the custody of the police?

A. No, no.

Q. I ask you, sir: Were there thirteen police officers with you at that time?

A. I have enumerated the policemen that were there. I do not know what that counts up to.

Q. Well, there were eight police officers with you?

A. Well, let's try it again.

Q. All right.

A. There was Chief Pape, his chauffeur, Detective Jerry Sullivan.

Q. Two.

A. Detective Pruneckle. Detective Conway. Detective McMahon. Detective Gerald Sullivan. My partner, Howard Felker, who is now deceased, and myself.

Q. That would be eight.

A. Yes.

Q. Did you see any police officers on that occasion break through two doors?

[29] A. No, sir.

Q. Did you see any police officer break through one door?

A. No, sir.

Q. Did you see any police officer wake the Monroe couple with flashlights?

A. No, sir.

Q. Did you see any police officer force the Monroes, or either of them, at gunpoint to leave their bed?

A. No.

Q. Did you see any police officer at gunpoint force either or both the Monroes to stand naked in the center of the living room?

A. No, sir.

Q. Did you see any police officer arouse any of the six Monroe children?

A. No, sir.

Q. Did you see any of the police officers herd these children into the living room?

A. No, sir.

Q. Or any other room in the house?

A. No, sir.

Q. Did you see Detective or Captain or Deputy [30]

Chief of Detectives, Frank Pape, strike Mr. Monroe several times with his flashlight?

A. No, sir.

Q. Did you hear Captain Pape at any time call Mr. Monroe "nigger"?

A. No, sir.

Q. Did you hear him at any time call Mr. Monroe "black boy"?

A. No, sir.

Q. Did you see any officer push Mrs. Monroe?

A. No, sir.

Q. Did you see any officer lay a hand on Mrs. Monroe in any fashion whatsoever?

A. No, sir.

Q. Incidentally, did you see Mrs. Monroe at any time?

A. Yes, I did.

Q. When did you see Mrs. Monroe?

A. About a minute or two minutes after we had entered the apartment, Mrs. Monroe walked out of the bedroom with a blanket wrapped about her.

Q. Did she thereafter change her clothes?

A. I don't remember.

[31] Q. Did you see any officer hit any of the children?

A. No, sir.

Q. Did you see any officer kick any of the children?

A. No, sir.

Q. Did you see any officer push any child to the floor?

A. No, sir.

Q. Did you see any police officer ransack any room in the house?

A. No, I did not.

Q. Did you see any police officer throwing clothes from closets to the floor?

A. No, sir, I did not.

Q. Did you see any police officer dumping drawers?

A. No, sir, I did not.

Q. Ripping mattress covers?

A. No, sir.

Q. Officer Higgins, you have been on the force for ten years—fourteen—no, twenty years?

A. 26 years.

Q. 26 years?

A. Yes, sir.

[32] Q. You were in Homicide how long, sir?

A. Almost eleven years.

Q. Was there anything different in the arrest of James Monroe, as charged with murder, than there would be of any other?

A. No, sir.

Mr. Reuben: I object to that question.

The Court: He has already answered.

Mr. Reuben: I was too late.

Mr. Kaveny: No further questions.

The Court: You may cross-examine, Mr. Reuben.

[33] *Cross-Examination by Mr. Reuben.*

Q. Officer Higgins, you mentioned two or three times about a chauffeur-driver. Did Captain Pape have a chauffeur, is that it?

A. There was a man driving his car, a detective who was driving his car that night.

Q. That was his chauffeur?

A. The reason I refer to him as the chauffeur, I'm trying to distinguish between the two Jerry Sullivans.

Q. I see. His job was primarily to drive Captain Pape, is that it?

A. I don't know what his job primarily was.

Q. Well, did he have a chauffeur's hat?

A. No, sir.

Q. Now, when you came into the Monroe apartment, Mr. Monroe was in his underwear, is that correct?

A. Yes, sir.

Q. Standing in the living room, right?

A. Yes.

Q. In front of all of his children, right?

[34] A. No. His children were not all there at that time.

Q. How many children were there?

A. Five or six.

Q. How old were they?

A. The oldest would be about sixteen, maybe seventeen.

Q. What was the next one down the line?

A. Well, I don't know, but the youngest, I'd say, may have been around three years old.

Q. So there were some small children as well?

A. Yes.

Q. They were frightened, weren't they?

A. I don't know if they were frightened.

Q. Was there any yelling going on?

A. Yes. I said they were calling us profane names.

Q. Who tripped?

A. I don't know if anyone tripped.

Q. Were any of the children pushed down?

A. I saw no one pushed down.

Q. You saw no one pushed down?

A. No.

[35] Q. Were you in uniform?

A. No, sir, I was not.

Q. Was anyone in uniform?

A. No, sir.

Q. Now, when Mr. Monroe was taken into custody, was he allowed to see a lawyer?

A. The last I saw of Mr. Monroe was when he left for the building at 11th and State.

Q. So as far as you know, he was not allowed to see a lawyer, is that correct?

Mr. Kaveny: Objection, your Honor.

By the Witness: A. I don't know.

The Court: He may answer, if he knows.

By the Witness: A. I don't know.

By Mr. Reuben: Q. Did you have a search warrant?

A. No, sir.

Q. Did you testify in the case of Monroe versus Pape for Captain Pape?

A. I was at the trial, yes, sir.

Q. And you testified as a witness for Captain Pape?

[36] A. I testified, yes, sir.

Q. You told your story then to the jury that heard the case of Monroe versus Pape, correct?

A. Yes, sir.

Mr. Reuben: That is all.

The Court: Is there any redirect examination?

Mr. Kaveny: No further examination, your Honor.

The Court: All right, thank you, sir. You are excused.

The Witness: Thank you, your Honor.

(Witness excused.)

The Court: You may call your next witness, Mr. Kaveny.

(There was a short interruption, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury:)

The Clerk: Take the stand, please. Raise your right hand, sir.

(The witness was thereupon duly sworn.)

[37] ANTON J. PRUNCKLE, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. State your name, sir.

A. Anton J. Prunckle, P-r-u-n-c-k-l-e.

Q. Your address, sir?

A. 10421 South Maryland.

Q. Your occupation, sir?

A. Police officer, City of Chicago.

Q. How long have you been so employed?

A. Since the year of 1945, approximately 23 years.

Q. Directing your attention to the morning of October 29, 1958, what division were you assigned to?

A. I was assigned to the Homicide Unit of the Chicago Police Department.

Q. On that morning did you participate in the arrest of James Monroe?

A. I did, sir.

Q. Will you tell us, sir, what transpired that morning [38] prior to that arrest, regarding the arrest?

A. Well, upon reporting for duty, we were working the first watch starting at midnight, we were sitting in the office typing up a report, when Officer Felker and Higgins approached me and my partner, Frank McMahon, and showed us a photo of a Negro gentleman and his record, stating that this gentleman had been—

Mr. Reuben: Your Honor—

The Court: Just state what you saw or observed, sir.

By the Witness: A. I observed a photo of a colored gentleman and a police record.

By Mr. Kaveny: Q. Was there a name on that photo?

A. No, sir.

Q. All right. What did you do then?

A. We were then instructed to assemble at a point at t. Louis and Roosevelt at five o'clock in the morning.

Q. Who was present at that assembly point, sir?

39] A. At that assembly point, my partner and myself, aptain Deputy Chief of Detectives Frank Pape, his river, Jerry Sullivan, Detective Gerald Sullivan, Conway, fficer Detective Higgins, and Felker.

Q. Where did you proceed from there, sir?

A. We then went to a residence, an apartment building t 1424 South Trumbull.

Q. What transpired there?

A. We were stationed at various positions. I was sta- oned in the rear of this first floor apartment building at 424 Trumbull, in the rear.

My partner then went into the front and the other detec- ves entered the place. Detective Conway and myself were he only ones that were outside.

Q. All right. Where were you stationed?

A. I was stationed—prior to entrance being made into he apartment, at that time I was stationed on the south ide of this apartment building and then stationed myself t the back door of the kitchen of this apartment.

40] Q. What did you observe with regard to how police fficers gained entrance to the building?

A. Somebody let them in through the back door, that's he only thing I know of, while I was stationed on the outh side, and then I stationed myself to the rear.

Q. Were you able to observe anything that transpired n the apartment?

A. I was able to—the kitchen was lit. I was able to see eople and police officers in the apartment.

Q. What did you observe the police officers doing?

A. I noticed them going into one room and then come ut and then they were talking to a colored gentleman.

Q. How was he dressed?

A. At that time he had a T-shirt on, I don't remember —it was a T-shirt or boxer shorts or both that he had on.

Q. Did he thereafter put on any other clothes?

A. He then disappeared from our view. They went [41] to the front section of the apartment.

Q. What happened after that?

A. Then later this gentleman came out through the rear kitchen entrance and handcuffs was placed on him by my partner, Frank McMahon, and attached to his wrist, and we transported him back to 1121 State Street.

Q. Do you know the identity of the gentleman you arrested?

A. I did learn by name he was James Monroe.

Q. How was he dressed when he was brought out of the apartment?

A. He was fully dressed, sir, but I don't recall what he was wearing.

Q. Pants?

A. Yes. He had pants on, and it was a short jacket, I remember.

Q. And shoes?

A. And shoes. I think the pants still had paint on them, because he remarked that he was doing some painting.

[42] Q. Were there thirteen police officers, yourself included, who were out on this arrest?

A. No, sir.

Q. Did you see any police officers break through two doors and gain entrance to the apartment?

A. No, sir.

Q. Did you see any police officer break through even one door?

A. No, sir.

Q. Did you see any police officer forcing either of the Monroes, husband and wife, to leave their bed at gunpoint?

A. No, sir, I did not.

Q. Did you see either of the Monroes standing naked in the center of their living room at gunpoint?

A. No, sir.

Q. Did you see either of them standing in the living room naked?

A. No, sir.

Q. Did you see any of the police officers sing any of the Monroe children?

A. No, sir.

Q. Did you see any of the police officers herding children into the living room?

[43] A. No, sir.

Q. Did you see Captain Pape strike Mr. Monroe several times with his flashlight?

A. No, sir.

Q. Did you hear Captain Pape call Mr. Monroe "nigger" or "black boy"?

A. No, sir.

Q. Did you see any police officer push Mrs. Monroe?

A. No, sir.

Q. Did you see any police officer hit or kick any or several of the Monroe children?

A. No, sir.

Q. Did you see any police officer push several or any of the Monroe children to the floor?

A. No, sir.

Q. Did you see any police officer ransacking every room or any room?

A. No, sir.

Q. Did you see any police officer throwing clothes from closets?

A. No, sir.

Q. Did you see any police officers dumping drawers?

[44] A. No, sir.

Q. Did you see any police officer ripping mattress covers?

A. No, sir.

Mr. Kaveny: No further questions.

The Court: You may cross-examine.

Cross-Examination by Mr. Reuben.

Q. You were outside during the arrest, were you not, Officer? You were outside of the apartment?

A. At the time when they entered, yes, sir, I was outside. I never did—

Q. You never went inside?

A. No, sir.

Q. So the fact is that you were not in a position to see much of what went on in the apartment, correct?

A. That is correct, sir.

Q. Or hear much of what went on in the apartment, is that correct?

A. That is correct, sir.

Mr. Reuben: That is all.

The Court: Is there any redirect examination?

Mr. Kaveny: No redirect, your Honor.

[45] The Court: All right. Thank you, sir. You are excused.

The Witness: Thank you.

(Witness excused.)

The Court: You may call your next witness, Mr. Kaveny.

(There was a short interruption, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

The Clerk: Take the stand, sir. Raise your right hand and be sworn.

(The witness was thereupon duly sworn.)

PATRICK D. CONWAY, called as a witness by the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. Would you state your name and address, please, sir.

A. Patrick D. Conway, 6842 North Dowagiac.

Q. Mr. Conway, you are employed how?

A. Presently?

[46] Q. Yes.

A. I am a policeman for the City of Chicago.

Q. You have been in that capacity for how long?

A. Twelve and a half years, sir.

Q. Directing your attention to October 29, 1958, did you have occasion to participate in the arrest of James Monroe?

A. Yes, I did.

[47] Q. Can you describe for us, sir, what transpired prior to the arrest and regarding that arrest that you know about?

A. When I reported to work that evening we were told that a picture of James Monroe was identified. Also, we were shown his record and was told he was identified by the victim's wife, Mrs. Saisi, and that we were to place him under arrest in the early morning hours.

Q. Did you do so?

A. Yes, sir. We met on Roosevelt and St. Louis Avenues at five or 5:30 in the morning.

Q. Who was present at that assembly point?

A. Deputy Chief Pape, Jerry Sullivan, myself, Detec-

tive Gerald Sullivan, Detective Anton Pruneckle, and John Higgins, Detective John Higgins.

Q. Approximately eight officers?

A. Yes, sir.

Q. After you met at the assembly point, did you proceed to Monroe's house?

A. We proceeded to the alley, yes, sir.

[48] Q. Were you given an assignment?

A. Yes. I was instructed by Deputy Chief Pape to remain in the alley and guard against any type of escape through the alley.

Q. What was the next thing that you observed, sir?

A. In about ten or fifteen minutes later, they came out with James Monroe and placed him in the squad car, a squad car.

Q. How was Mr. Monroe dressed at that time?

A. I believe he had some type of a jacket on, and normal street clothes.

Q. Was Mr. Monroe handcuffed?

A. Yes, sir.

Q. About what time of day was this?

A. At, I believe, the closest would be daybreak at that time.

Q. Were there thirteen police officers assigned, including yourself, to make this arrest?

A. No, sir.

Q. Did you see Captain Pape strike Mr. Monroe several times with his flashlight?

[49] A. No, sir.

Q. Did you hear Captain Pape call Mr. Monroe "nigger" or "black boy"?

A. No, sir.

Mr. Kaveny: No further questions.

The Court: You may cross-examine.

Cross-Examination by Mr. Reuben.

Q. You were in the alley the whole time, correct?

A. That is correct, sir.

Q. Therefore, you really do not know what occurred up in the Monroe apartment?

A. No, sir.

Mr. Reuben: That is all.

The Court: Is there any redirect?

Mr. Kaveny: No redirect, your Honor.

The Court: All right. Thank you, sir. You are excused.

(Witness excused.)

The Court: You may call your next witness.

[50] (There was a short interruption, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury:)

(The witness was thereupon duly sworn.)

JERRY J. SULLIVAN, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. Would you state your name and your address, sir.

A. Jerry J. Sullivan, 1244 North Laramie Avenue.

Q. Your occupation, sir?

A. I am a Chicago police officer.

Q. How long have you been so employed?

A. Twenty years.

Q. Directing your attention to the morning of October 29, 1958, what was your assignment?

A. I was assigned as a driver for the Deputy [51] Chief of Detectives, Frank Pape at the time.

Mr. Reuben: I am sorry, I did not hear the last part of the answer.

The Court: Will you read the answer, please?

A. (Read by the reporter.)

Mr. Reuben: Thank you.

By Mr. Kaveny: Q. Did you participate in the arrest of James Monroe on that date?

A. Yes, sir, I did.

[52] Q. Would you tell us, sir, what transpired that morning regarding this arrest and prior to the arrest itself.

A. We had knowledge that a man by the name of James Monroe, whose picture had been identified, had killed a man by the name of Saisi. As I said, the individual's picture had been identified in the Identification Section.

At the time Deputy Chief Pape was working the midnight watch. I was working the midnight watch along with him. There had been no supervisor in the Homicide unit. Captain Pape at the time was the only supervisor of supervisory rank that was present in the Detective Division.

A plan was then formulated in which we were to go over to Monroe's home and place him under arrest for this murder.

Q. Who were the other police officers that were with you at that time, that is, in the morning at the time of the arrest?

A. There was a Detective Gerald Sullivan of the Homicide unit, Detective Frank McMahon of the Homicide unit, Detective Anton Pruneckle from the Homicide unit. Did I say Frank McMahon?

[53] Q. I believe so, sir.

A. Patrick Conway. I believe that's all I can recall at the present time.

Q. Were you given any duty assignment with regard to this arrest?

A. I was assigned with the Deputy Chief of Detectives, and I was told my duties were to obey his orders whatever they may be.

Q. Did you accompany him into the house?

A. Yes, sir, I did.

Q. Did you observe how entrance was gained to the house?

A. Yes, sir.

Q. How was that done, sir?

A. Captain Pape knocked on the front—on the back door, rather. The door had a window in it which was, you might say, in the upper third portion of the door. After several knocks a light went on in the kitchen and a young boy appeared at the door. The Captain produced his star through the window pane and asked if James Monroe lived at that particular home, and he was told—I was standing right there—we were told that he did live there. The boy then opened the door to let us in. We asked where Monroe was at, where [54] his bedroom was, and we were told that he was in the front portion of the home, of the flat.

Q. How many police officers entered the apartment with you at that time?

A. I believe it was just Pape and myself.

Q. What did you do?

A. We proceeded forward to the front end of the house, down the hallway, which led from the kitchen to the front room, and the bedroom was right at the end of the hallway on the lefthand side of the hallway as you approach the front room.

Q. Would you tell us what transpired at that time?

A. I turned on the light in the front room and the bedroom, and Monroe—or the gentleman and a lady who were in bed who later identified themselves as James Monroe and Mrs. Monroe—were laying in bed. There were a couple of beer bottles laying on the floor, knocked over, and we asked if he was James Monroe. He said yes. We asked him to get out of bed, which he did.

Q. Where was Mr. Monroe taken at that point?

[55] A. Into the front room.

Q. Who took him into the front room?

A. I did.

Q. How was Mr. Monroe dressed at that time?

A. He had on a pair of shorts and a T shirt.

Q. Was he given any clothing?

A. I gave him a pair of slacks and a pair of shoes.

Q. What happened after that, sir, if you recall?

A. I proceeded to search the bedroom.

[56] Q. How did you go about doing that, sir?

A. Well, I went through the closet. I believe there was a chest of drawers along the wall. There were pipes in the upper portion of the room with a radiator on the ceiling for heating purposes. I ran my hand along the radiator, along the pipes.

Q. What were you looking for, sir?

A. Looking for a gun that was used in the murder, and several shirts that were taken in this particular crime.

Q. Where was Mrs. Monroe while this was going on?

A. She was laying in bed.

Q. What happened after that?

A. I asked her if she would get out of bed. She did.

Q. How was she dressed?

A. She had some type of a jersey sweater-shirt of some type on the top, and she wrapped the blankets around her middle.

Q. Where did Mrs. Monroe go?

A. I don't recall; I didn't pay any attention.

[57] Q. Did she ever change her clothes thereafter?

A. I believe she did. I believe she put a robe on sometime later. I didn't see when or how or where.

Q. What was Captain Pape doing at this time?

A. Pardon me?

Q. What was Captain Pape doing at this time?

A. He helped me search the room, and he also interviewed James Monroe.

Q. How many children in the family?

A. I don't recall. I know there were three or four boys, teen-agers. One girl was a teen-ager, I believe, and a little child.

Q. Of these children, how many of them were in the front room?

A. Well, during the time that we were there, I believe that they were all in the front room at one time or another.

Q. Did any police officer bring any of these children [58] into the room.

A. No. They walked in and out.

Q. Was there any conversation by any of these children with you or with the police officers who were with you?

A. Well, there was verbal abuse. That is, we were called several vile names by these children.

Q. Did Mr. Monroe engage in any conversation with you people?

A. Not to me, he didn't.

Q. Was Mr. Monroe then taken out of the house?

A. Yes, sir.

Q. How long were you in the apartment?

A. Somewhere in the vicinity of ten to fifteen minutes.

Q. Did you accompany Mr. Monroe to the squad car?

A. Yes, sir.

Q. Did you take Mr. Monroe to the police station?

A. No, sir.

Q. Tell me, sir, did you observe thirteen police [59] officers, including yourself, making this arrest?

A. No, sir.

Q. Did you observe any police officer breaking through one or two doors and then gain entrance to the house?

A. No, sir. There were no doors broken.

Q. Did you observe anyone waking the Monroe couple with flashlights?

A. No, sir.

Q. Did you observe any police officer forcing the Monroes at gunpoint to leave their bed?

A. No, sir.

Q. Did you observe any police officer at gunpoint forcing the Monroes to stand naked in the center of the living room?

A. No, sir.

Q. Did you observe the Monroes at any time standing naked in the center of the living room?

A. No, sir.

Q. Did you observe any police officer rousing the six Monroe children?

[60] A. No, sir.

Q. Did you observe any police officer herding any of these six children into the living room?

A. No, sir.

Q. Did you at any time overhear Captain Pape call Mr. Monroe either "nigger" or "black boy" or both?

A. No, sir.

Q. Did you observe Captain Pape at any time striking Mr. Monroe with his flashlight?

A. No, sir.

Q. Did you see any police officer push Mrs. Monroe?

A. No, sir.

Q. Did you see any police officer place any hand on Mrs. Monroe?

A. No, sir.

Q. Did you observe any officers hitting the several Monroe children?

A. No, sir.

[61] Q. Did you observe any police officer kicking any on the Monroe children?

A. No, sir.

Q. Did you observe any police officer pushing the children to the floor?

A. No, sir.

Q. Did you observe police officers or any of them ransacking every room in the house?

A. I searched one bedroom, but I—

Q. Did you ransack that bedroom?

A. Just for the purpose of searching for the shirts, as I said, and the gun.

Q. When you searched the bureau, what did you do?

A. I opened the drawers and stuck my hand underneath the clothes and into the clothes, as they were folded, and searched for this particular weapon.

Q. Did you take any of the clothes out of the drawer?

A. No, sir.

Q. Did you close the drawer after you had done that?

A. Yes, sir, surely.

[62] Q. Did you follow the same procedure through all the drawers?

A. Through all the drawers.

Q. What did you do about the closet?

A. I went through the closet. There were several bags of clothing that were on the floor of the closet and several pieces of clothing that were hung up on hangers.

Q. What did you do in regard to that?

A. I patted them down, I searched them with my hands; I patted them and I left them.

Q. Did you throw anything out of the closet?

A. No, sir, I didn't.

Q. Did you observe any other police officer throwing clothes from closets onto the floor?

A. No, sir.

Q. Did you observe any police officer dumping drawers?

A. No, sir.

Q. Did you observe any police officer ripping mattress covers?

A. No, sir.

Q. You have been a police officer for how long?

A. 20 years.

[63] Q. How long were you with the Homicide Division?

A. I was in the Detective Division.

Q. I beg your pardon. How long have you been in the Detective Division?

A. Well, I was in from 1951 to 1961.

Q. What is your present duty assignment?

A. I am now a sergeant in the Robbery Section in Area 6.

Q. How long have you been in that rank and position?

A. I was promoted to sergeant in January of 1961, and I have been in the Robbery Section since May of 1963 as a sergeant.

Q. Until the present time?

A. Yes, sir.

Mr. Kaveny: No further questions.

The Court: You may cross-examine.

Cross-Examination by Mr. Reuben.

Q. Officer Sullivan, in 1958 you were Captain Pape's chauffeur, is that correct?

A. Yes, sir.

Q. Now, you said that you went out to arrest James Monroe for the murder of somebody. You know [64] now that James Monroe did not murder that person, do you not?

A. Yes, sir.

Q. He was never charged with the murder, was he?

A. No, sir, he wasn't.

Q. Now, did you testify in the case which James Monroe brought against Captain Pape?

A. Yes, sir.

Q. In the Federal Court here?

A. Yes, sir.

Q. You testified for Captain Pape?

A. I testified because I was named in the suit by James Monroe and his attorneys.

Q. When you walked into the Monroe bedroom, were they awake or were they asleep?

A. I believe they were asleep.

Q. Did you put a flashlight on them?

A. No, sir.

Q. Nobody put a flashlight on them. Is that your testimony?

A. Not to my knowledge. We turned on the lights, a light switch.

Q. Neither you nor Captain Pape put a flashlight on them. Is that your testimony?

[65] A. Not to my knowledge, no.

Q. Is it your testimony that you searched the bedroom?

A. Yes, sir.

Q. Where was Mrs. Monroe?

A. She was in bed.

Q. So you had your back turned to her while you were searching?

A. At times.

Q. She remained in bed, is that correct?

A. Not the entire time, no.

Q. At what point did she get up?

A. When I asked her to get out of bed because I wanted to search underneath the mattress.

Q. I see. You had completed every other part of your search?

A. Just about, yes, sir.

Mr. Reuben: Thank you.

The Court: Is that all, Mr. Reuben.

Mr. Reuben: Yes, your Honor.

The Court: Is there any redirect, Mr. Kaveny?

Mr. Kaveny: No redirect, your Honor.

The Court: All right. Thank you, sir. You are excused.

[66] (Witness excused.)

The Court: You may call your next witness.

Mr. Kaveny: May we have a moment, your Honor?

The Court: Would you like a short recess?

Mr. Kaveny: Yes, your Honor.

The Court: All right. We will take a five minute recess. Take the jury to the jury room.

[67] The Clerk: The case on trial.

The Court: Are you ready to proceed?

Mr. Kaveny: Yes.

Mr. Reuben: Yes, your Honor.

The Court: You may call your next witness.

Mr. Kaveny: Thank you, sir.

(There was a short interruption, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

The Clerk: Take the stand, please.

Raise your right hand, please.

(The witness was thereupon duly sworn.)

FRANK A. McMAHON, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. State your name, your address, and your present occupation, sir.

A. Frank A. McMahon, 7906 South Whipple Street, Chicago. I am an Assistant General Agent for the [68] John Hancock Mutual Life Insurance Company.

Q. Mr. McMahon, in October, 1958, you were employed by whom?

A. By the City of Chicago, Department of Police.

Q. What was your duty assignment at that time?

A. I was a detective in the Homicide Section of the Detective Bureau.

Q. Directing your attention, sir, to the morning of October 29, 1958, did you have occasion to participate in the arrest of James Monroe?

A. Yes, sir, I did.

Q. Will you describe for us, sir, what occurred prior to the arrest, regarding that arrest?

A. Yes, sir. When I reported for duty at midnight on October 29th, I was informed by the sergeant, Edward Cagney, that a James Monroe, whose picture was shown to me, and his criminal record, had been identified as one of two men who had killed Peter Saisi.

[69] Q. Were you given any directions at that time, sir?

A. Yes, sir. I was told to effect his arrest, to assist in effecting his arrest.

We had no immediate sergeant that particular night on the midnight watch, so we were informed that the Deputy Chief of Detectives, if at all possible, Frank Pape, would meet us and assist us in the arrest.

Q. Did you meet with Captain Pape?

A. Yes, sir, we did.

Q. When did you do that?

A. It was approximately 5:15 or 5:30 that morning.

Q. Where did you meet him?

A. On Roosevelt Road at St. Louis, sir.

Q. After you met him—incidentally, how many officers were there, including yourself and Captain Pape, at Roosevelt and St. Louis?

A. Myself, my partner Anthony Prunckle, there was Officers Conway and Sullivan, there was Officer Felker, who is now deceased, sir, and his partner, John Higgins, and Captain Pape and his driver, Sullivan.

[70] Q. A total of eight?

A. Yes, sir, eight.

Q. After you met with these people at that time and place, what did you do?

A. We met with Captain Pape at Roosevelt and St. Louis and proceeded to the home of Mr. Monroe, the apartment of Mr. Monroe.

Q. When you arrived there, did Captain Pape make any duty assignment for you?

A. Yes, sir. He instructed me to go to the front of the building and remain there until he notified me to do otherwise.

Q. Did you do that?

A. Yes, sir, I did.

Q. How long did you remain out there, sir?

A. I was only out there for a very short period of time. It was a minute, two minutes at the very, very most.

I no sooner got out there when Captain Pape was motioning me to come in.

Q. And did you?

A. Yes, sir, I did. I went in through the front of the building.

[71] Q. Who let you in?

A. A woman who later was identified as Mrs. Monore.

[72] Q. How was Mrs. Monroe dressed at that time?

A. I can recall that she had a robe. It was like a flowered robe.

Q. Did you enter the living room, sir?

A. Yes, I did.

Q. Tell us that you observed transpiring in the living room at that time.

A. A man who was identified as Mr. Monroe was standing in the living room and Captain Pape was in the living room, and I was instructed to stand at the hallway of the living room.

Q. Did you observe anyone carrying on any conversations at that time?

A. There was a lot of conversation. There was a lot of talking and yelling.

Q. Who was doing the yelling?

A. There were children, five or six children were screaming and yelling.

Q. How old were these children?

A. They ranged in age, sir, from very young, three or four years old, up to fifteen or sixteen, if memory serves me right.

Q. Which of these children were doing the yelling?

[73] A. All of them seemed to be yelling, sir.

Q. What was the nature of their yelling, sir?

A. Well, they were swearing at us for being police in their home.

Q. Did Mr. Monroe participate in this?

A. Mr. Monroe seemed all right. He was standing there talking to Captain Pape.

Q. How was Mr. Monroe dressed at that time?

A. In underclothing, sir. He had shorts and some type of a T shirt on.

Q. Was he thereafter dressed?

A. Yes, a pair of dungarees and some type of a shirt was given to him to put on.

Q. Was he taken from the house?

A. Yes, sir.

Q. What was the elapsed time that you were there?

A. In the house, sir?

Q. Yes, sir.

A. Ten minutes, it seems like. Ten minutes would be a long time. Ten or fifteen minutes.

Q. Now, sir, were thirteen police officers with you when you went to that apartment to make that [74] arrest?

A. No, sir.

Q. You were investigating a murder at that time?

A. Yes, sir. A crime in fact had been committed and I was told that James Monroe was identified as the man responsible for the murder.

Q. Did you see any police officer break through any door to gain entrance to that house?

A. No, sir, I did not.

Q. Did you see any police officer break through two doors to gain entrance?

A. No, sir, I did not.

Q. Did you see any police officer wake the Monroe couple with flashlights?

A. No, sir. As I said, when I got in, they were up.

Q. Did you see any police officer force either of the Monroes to leave their bed and stand naked in the center of the living room?

A. No, sir.

Q. Did you see any of the police officers rouse any of the six Monroe children?

A. No, sir, I did not.

Q. Did you see any police officer herd any of [75] the Monroe children into the front room?

A. No, sir, I did not.

Q. Incidentally, regarding the children, was there any police officer having those children in custody?

A. Not to my knowledge.

Q. Were the children free to move about?

A. They were moving about, yes, sir.

Q. Did you see Captain Pape strike Mr. Monroe with his flashlight?

A. No, I did not.

Q. Did you see him strike Mr. Monroe with his flashlight several times?

A. No, I did not.

Q. Did you hear Captain Pape call Mr. Monroe "nigger"?

A. No, I did not.

Q. Or "black boy"?

A. No, I did not, sir.

Q. Did you see any police officer push Mrs. Monore?

A. No, I did not.

Q. Was Mrs. Monroe in the custody of any police officer?

A. No, sir.

Q. Was she free to move about?

[76] A. Yes. She let me in.

Q. Did you see any police officer hit any of the Monroe children?

A. No, I did not.

Q. Did you see any police officer kick any of the Monroe children?

A. No, sir, I did not.

Q. Did you see any of the police officers push any of the Monroe children to the floor?

A. No, sir.

Q. Did you see any police officer ransack—strike that.

Did you see the police officers, or any of them, ransacking every room in the house?

A. No, sir.

Q. Did you see the police officers ransack any room in the house?

A. No, I did not.

Q. Did you see any police officers throwing clothes from closets onto the floor of any room?

A. No, sir.

Q. Did you see any police officer dumping drawers?

A. No, sir, I did not.

[77] Q. Did you observe any police officer ripping a mattress?

A. No, sir, I did not.

Q. How long were you a police officer in 1958?

A. Thirteen years in 1958.

Q. How long had you been assigned to the Homicide Division in October of 1958?

A. Three and a half years, sir.

Q. How long after that did you remain in the Homicide Division?

A. Until October 1st, 1960.

Q. Did you terminate your employment with the Police Department at that time?

A. Yes, sir. I resigned.

Mr. Kaveny: No further questions.

The Court: You may cross examine.

Mr. Reuben: Thank you.

[78] *Cross-Examination by Mr. Reuben.*

Q. Did you observe, Officer, any of the searching of the house?

A. No, sir, I did not see any searching.

Q. So that in your presence there was no searching at all?

A. No, sir.

Q. By Officer Sullivan or anybody?

A. No.

Q. Did you observe Mr. Monroe with either Captain Pape or with Officer Gerry Sullivan, say, in the living room?

A. Yes, sir, I did.

Q. Mr. Monroe was a colored gentleman, wasn't he?

A. Yes.

Q. And he was a gentleman, wasn't he?

A. He was to me, yes.

Q. And Mrs. Monroe was a lady, was she not?

A. She sure was.

Q. A colored lady?

A. Yes.

Q. Is it your testimony that you heard the three-year-old boy, for example, swearing and cussing?

[79] A. I heard all of the children yelling, screaming and swearing. Which one said what or did what, I don't know.

Q. So it is not your testimony that all of the children were swearing, is it, Officer?

A. Yes.

Q. I see. Including the three-year-old?

A. Well, I know he was there. What he was—

Q. I see. What cuss words did the three-year-old utter, Officer?

Mr. Kaveny: Objection.

The Court: If he knows, he may answer.

By the Witness: A. I don't know.

By Mr. Reuben: Q. Now, when you and your brother officers went to the home of Mr. Monroe, did you believe he was a murderer?

A. I was informed that he had been identified as a man who had killed Peter Saisi.

Q. Well, then, you did believe he was a murderer?

A. I knew a crime in fact was committed and I had

reasonable grounds to believe that James Monroe [80] was one of the people wanted for it, sir.

Q. So that you thought you were arresting a murderer?

A. I was doing my job of arresting James Monroe.

Q. And you thought James Monroe was a murderer, is that correct?

A. I did not know he was a murderer.

Q. You did not know whether he was a murderer or not?

A. No. I could not judge the man.

Q. You thought he might be innocent, is that it?

A. Possibly, yes.

Q. You had no feelings either way?

A. Other than, as I stated, that I had reason to believe —I knew a crime had been committed and he had been identified as being responsible for the crime.

Q. So that you knew he was identified as a murderer—

A. Yes.

Q. —by somebody?

A. Yes.

Q. Is that correct?

[81] A. That is correct.

Q. And I take it that Captain Pape knew that, is that correct?

A. Yes.

Q. So that you were dealing with a man accused of murder, a murder suspect, is that correct?

A. Right.

Q. And it is your testimony that through all this everything was calm and peace and quiet in terms of the officers' demeanor and the way they approached the Monroes, is that correct?

A. Yes, sir.

Q. And they were very gentle with accused murderer Monroe?

A. Yes, sir. I had a nice conversation with Mr. Monroe.

Q. You Did.

A. Yes.

Mr. Reuben: Thank you.

The Court: Is there any redirect?

Mr. Kaveny: No, your Honor.

The Court: All right. Thank you, sir. You are excused.

The Witness: Thank you.

[82] (Witness excused.)

The Court: You may call your next witness.

(There was a short interruption, after which the following further proceedings were had herein, in open, in the presence and hearing of the jury, to-wit:)

The Clerk: Take the stand, sir. Raise your right hand, please.

(The witness was thereupon duly sworn.)

GERALD T. SULLIVAN, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. State your name and your address, please, sir.

A. Gerald T. Sullivan, 7808 South Wood.

Q. Your occupation, sir?

A. I am a policeman, a police officer.

Q. Your rank?

A. Lieutenant.

Q. What division, sir?

A. The Central Services Division, the Bureau of Staff Services.

Q. How long have you been a police officer?

A. 26 years.

Q. How long have you been a lieutenant?

A. Seven.

Q. Prior to that where were you assigned, sir?

A. I was assigned to the Homicide Division for thirteen years.

Q. Were you a sergeant in the Homicide Division?

A. I was, for about four months or five months.

Q. You were, prior to that, a detective?

A. Yes.

Q. In the Homicide Division?

A. Yes.

Q. Directing your attention, sir, to the morning of October 29, 1958, did you have occasion to participate in the arrest of James Monroe?

A. I did.

Q. Will you tell us, sir, regarding that arrest, what transpired prior to the arrest?

A. Well, I was working the midnight shift and I came to work shortly before midnight, and I was informed that we had to meet Chief Pape, Deputy Chief Pape at that time, and go and pick up a man by the [84] name of Monroe, whose picture was identified in the B. of I.

Q. Was there a partner with you?

A. Yes, Patrick Conway.

Q. All right. Did you proceed to make that arrest?

A. Yes. We met Chief—

Q. Go ahead, sir.

A. Yes, sir. We met Chief Pape and we proceeded to the address.

Q. Where did you meet Captain Pape?

A. It was on 12th Street. I don't know whether it was 12th and Trumbull or—to my best recollection, 12th and Trumbull or St. Louis, I'm not positive.

Q. Who was present besides you and Captain Pape and your partner, Conway?

A. There were Howard Felker, John Higgins, Prunckle and McMahon.

Q. Were these all members of the Homicide Division?

A. Yes, sir.

Q. Did you proceed from there—

A. To the home of James Monroe.

Q. All right. Will you tell us how entrance was [85] gained into the home?

A. Well, Chief Pape and Detective Gerry Sullivan and myself and John Higgins went to the back door.

The other men—my partner, Pat Conway, I think was stationed in the alley or in the back yard, and others were deployed around the house, stationed around the building.

When we got to the back door, Chief Pape rapped on the door and shortly thereafter a young boy came, put the light on in the kitchen and Chief Pape told him that we were the police and showed him the star, and he was admitted, he and Gerry Sullivan.

They went in and shortly thereafter Chief Pape—the light went on in the front part of the apartment and Chief Pape called myself and John Higgins in and when we got in, Monroe was standing in the parlor.

[86] Q. Who was with Mr. Monroe in the parlor at that time?

A. Chief Pape.

Q. How was Mr. Monroe dressed?

A. To the best of my recollection, I think he had a pair of shorts on, and a T-shirt.

Q. Was he thereafter given any clothing?

A. Yes, he was, shortly thereafter.

Q. What transpired after that, sir, if you recall?

A. Well, there were a number of children there. How many, I don't know, but they were running back and forth

in the house, and there was a little disturbance on their part, but other than that, Monroe was given his clothes and he was informed that his picture had been identified. The total time we were there, I imagine, was about ten minutes, and we left.

Q. Was Mr. Monroe informed that his picture had been identified in connection with a murder?

A. That I don't recall. I don't think so. I think it was in connection with a robbery, I think that he was told.

[87] Q. Is there something about good police work that you would not tell him that he had been charged with a murder at that time?

A. Certainly.

Q. Did you see Mrs. Monroe?

A. Yes, sir, I did.

Q. How was she dressed?

A. When I came in she had a blanket or something wrapped around her. Later on, I believe she had a robe on. I don't know where she changed or how she changed, but when I saw her first, she had a blanket wrapped around her.

Q. Incidentally, Officer, did Mrs. Monroe change into her robe in front of any police officer?

A. Not that I know. I didn't see her change.

Q. Did you see any police officers conducting any search of the apartment?

A. I was stationed in the parlor with John Higgins. I didn't see anything in any of the rooms. When we came in we stayed in the parlor, Higgins and I, with Monroe.

Q. Did you hear any of the conversation of the [88] children directed toward the police officers?

A. To the best of my recollection, it wasn't good language. They were calling us names and nasty words.

Q. Did Mr. Monroe use any language like that?

A. He was talking, but I can't recall exactly what he

said, but he was talking fairly loud, but what he said I can't recall, exactly what he said.

Q. Did you hear any language of Mrs. Monroe?

A. Well, she was abusive, yes.

Q. Was Mr. Monroe placed under arrest?

A. Yes, he was.

Q. How was he dressed when he was placed under arrest?

A. He had a pair of dark blue pants on. They looked like work pants. They had either paint or plaster or something on them, and he had a dark jacket. He was given his shoes, and that's when we left.

Q. Was he placed in a squad car?

A. Yes, he was.

[89] Q. Did you accompany him in that squad car?

A. No, sir.

Q. Now, Lieutenant Sullivan, were there thirteen police officers involved in this arrest at Mr. Monroe's house?

A. No. There were only the men I mentioned.

Q. About eight?

A. Myself and Conway, Higgins and Felker, Pruneckle and McMahon, Chief Pape and Jerry Sullivan.

Q. About eight?

A. Eight.

Q. You were investigating a murder?

A. We were assigned to this. I didn't take part in the original investigation, but the men that had been assigned to it asked us to make this arrest and we came to work.

Q. This arrest was being made in connection with a robbery?

A. That's right, yes.

Q. This gentleman was one of the accused?

A. That's right.

Q. Did you see any police officer break through [90] two doors to gain entrance to the apartment?

A. No, sir. The door was opened for us.

Q. Did you see any police officer break through one door to gain entrance to the apartment?

A. No, sir.

[91] Q. Did you see any police officer wake the Monroe couple with flashlights?

A. No; absolutely not.

Q. Did you see any police officer force either of the Monroes at gunpoint to leave their bed?

A. No.

Q. Did you see any police officer force either of the Monroes at gunpoint to stand naked in the center of the living room?

A. No, sir, absolutely not.

Q. Incidentally, Lieutenant Sullivan, did you see either of the Monroes at any time without clothes on?

A. No.

Q. Did you at any time see any police officer point a gun at either of the Monroes?

A. No.

Q. Did you see any police officer rouse any of the Monroe children?

A. No, I didn't. I was in the parlor. I didn't see any of it.

Q. Did you see any police officer herd the six Monroe children into the living room?

A. No, no.

[92] Q. Were the children free to move about?

A. They were moving about very freely.

Q. Was there any police officer in charge of the children?

A. Not that I can recall.

Q. Was there any police officer in charge of Mrs. Monroe?

A. No, sir.

Q. Did you see Captain Pape strike Mr. Monroe several times with his flashlight?

A. No.

Q. Did you see Captain Pape strike Mrs. Monroe on one occasion with his flashlight?

A. No, sir.

Q. Did you hear Captain Pape call Mr. Monroe "nigger"?

A. No.

Q. Did you hear Captain Pape call Mr. Monroe "black boy"?

A. No.

Q. Did you see any police officer push Mrs. Monroe?

A. No, sir, I did not.

Q. Did you see any police officer lay a hand [93] on Mrs. Monroe?

A. None whatsoever.

Q. Did you see any police officer hit any of the Monroe children?

A. No, sir.

Q. Did you see any police officer kick any of the Monroe children?

A. No, sir.

Q. Did you see any police officer push any Monroe child to the floor?

A. No.

Q. Did you see any police officer ransack any room in the house?

A. No, sir, I didn't.

Q. Did you see the police officers ransack every room in the house?

A. No, sir.

Q. Did you see the police officers throwing clothes from the closets to the floor?

A. No, sir.

Q. Did you see the police officers dumping drawers?

A. No.

Q. Did you see the police officers ripping [94] mattresses?

A. No, sir.

Q. Incidentally, how long were you in the Homicide Division?

A. Approximately 13 years.

Q. You left that Division?

A. After I was promoted to Lieutenant.

Q. The date or the year of that?

A. That was January of '61.

Q. Since then you have been where?

A. Well, I was assigned to the 8th District for a short time till January—I was promoted October 1 of '61. I beg your pardon. I left the 8th District January 13th and I was assigned to the Chief of Patrol as an aide and as a liaison between the Patrol and the Detective Division. I remained there until November of last year, a year ago last November, about 14 months ago, and I was then assigned as the commanding officer of the Auto Pound Division, the Bureau of Staff Services. That's where I'm stationed now.

Q. You are commander of the Auto Pound District, Bureau of Staff Services at the present time.

A. That's right.

[95] Mr. Kaveny: Thank you, sir. I have no further questions.

The Court: You may cross-examine, Mr. Reuben.

Cross-Examination by Mr. Reuben.

Q. You had no search warrant when you went to the Monroes' house or apartment, did you?

A. No, sir.

Q. You were informed that you were going to arrest a man who had been accused of murder, correct?

A. That's right?

Q. You were armed?

A. I was armed?

Q. Were you?

A. Yes, sir, yes.

Q. All the officers were armed, I take it?

A. Certainly.

Q. Was Mr. Monroe a colored gentleman?

A. Yes, he was.

[96] Q. Mrs. Monroe was a colored lady?

A. Yes, sir.

Q. This was just a very mild treatment of the Monroes when you went into the house of an accused murderer, is that correct?

Mr. Kaveny: Objection, your Honor. That is a characterization.

The Court: Objection sustained.

Mr. Reuben: I will withdraw the question and rephrase it, your Honor.

By Mr. Reuben: Q. When you went to the Monroes' apartment, you thought you were arresting a man who had committed a violent crime, correct?

A. Yes. He was accused of murder.

The Court: Will you please speak up, sir, so that all members of the jury can hear you.

The Witness: Yes, sir.

By Mr. Reuben: Q. It would be customary to make an extensive search of the house of such a person, would it not?

A. Ordinarily we would search, yes.

[97] Q. It would be customary to be pretty firm in your treatment of such a person, would it not?

Mr. Kaveny: Objection, your Honor, as to what was customary.

The Court: He may answer, if he knows what was usual and customary.

By the Witness: A. Normal procedures. If we take a man into custody, we make sure he's in custody. There is no difference in any arrest. The arrest is the same.

By Mr. Reuben: Q. You mean that you would treat a person that you were arresting for disorderly conduct about the same way that you would treat a person that you were arresting who was charged with murder?

Mr. Kaveny: Objection, your Honor.

The Court: Objection sustained.

Mr. Reuben: No further questions.

[98] *Redirect Examination by Mr. Kaveny.*

Q. Lieutenant Sullivan, in October of 1958 you had been in the Homicide Division for some time?

A. Yes, sir.

Q. You had been in the Homicide Division for some time after October, 1958?

A. That's right.

Q. Was the arrest of Mr. Monroe and the procedures followed any different than the procedures followed in arresting anyone accused of murder?

A. No, sir. They were normal operating procedures. We were following departmental rules and regulations.

Mr. Kaveny: No further questions.

Recross Examination by Mr. Reuben.

Q. When you arrest a murderer, do you look for a weapon?

A. Ordinarily we would, yes, sir.

Q. Do you take more precaution than you would [99] with a person who was charged with a lesser crime?

A. Well, when you arrest a man you have to take normal, ordinary precautions, not only for your own life but to maintain and keep the man in custody. The same

precautions are standard operating procedures, whether it be for robbery, murder, burglary, and so forth.

Q. All of the felonies?

A. That's right.

Q. All of the violent crimes. Your procedures are geared to deal with the person who may be violent, is that not correct, Officer?

A. Yes, and—

Mr. Reuben: You have answered my question. Thank you.

Redirect Examination by Mr. Kaveny.

Q. Were you going to finish your answer to Mr. Reuben's last question, Officer?

The Court: Did you finish your answer, sir.

[100] By the Witness: A. I was going to say that a man arrested for disorderly conduct could be just as dangerous to us, to our own lives, and the police officers' lives, as a man arrested for murder.

Mr. Kaveny: No further questions. Thank you.

The Court: All right. Thank you, sir. You are excused.

(Witness excused.)

The Court: You may call your next witness, Mr. Kaveny.

Mr. Kaveny: May I have a sidebar discussion, your Honor?

The Court: Do you want the reporter?

Mr. Kaveny: No.

(There was discussion between court and counsel at sidebar, out of the hearing of the jury, which was not reported.)

[101] (The witness was thereupon duly sworn.)

FRANK W. PAPE, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. Would you state your name, please.

A. Frank W. Pape.

Q. What is your rank in the Police Department?

A. Captain of Police, Traffic Division.

Q. How long have you been in the Police Department?

A. Thirty-three years.

[102] Q. In October of 1958 you were Deputy Chief Detective?

A. I was.

Q. On October 27, 1958, did you have occasion to participate in the investigation of Mr. Saisi's murder?

A. I did.

Q. Did you interrogate Mrs. Saisi?

A. I did.

Q. Did she describe to you the assailants of her husband?

A. She did.

Q. Would you tell us how she described her assailants?

A. She said that there were two colored men who had shot and killed her husband in the basement of her home, and that while both men were tall, one was exceptionally tall, that he was so tall that his head almost struck the ceiling of their basement. We measured the height of that basement. It was approximately six foot two. In other words, the gentleman she described would have been over six foot two in height.

[103] Q. Did she give you any weight that the men might be?

A. He was a well-built man, and along with the murder

of her husband, she stated that these two men had taken some white shirts from the closet, and she had one white shirt that had been left behind and it had a trade name on it, which we took.

Q. Did you participate in the arrest of James Monroe on October 29, 1958?

A. I did.

Q. Who were the police officers who were with you at that time?

A. The seven police officers who testified here previously.

Q. Would you describe to us, sir, how entrance to the building was obtained?

A. I proceeded to an area close to this home at 1424 Trumbull Avenue. I met the officers who were so assigned to this investigation. They were not assigned by me; they were assigned by Sergeant Cagney who testified here, and when we got to the area, the place of appointment, we went to the home at 1424 South [104] Trumbull Avenue.

Earlier that morning, prior to meeting the officers, I assigned two of them to go to 1424 Trumbull Avenue for the purposes of seeing what type of a structure this was. They reported back to me that it was a large building containing many apartments, and I believe we had previous information that Monroe resided in the basement apartment on the south side of this building.

Q. Prior to that arrest, sir, were you given any information regarding this gentleman?

A. Officer McMahon and his partner came in to me and said they had been assigned by Sergeant Cagney to make an arrest of one person, James Monroe, whose picture had been identified by Mrs. Saisi as having been one of the two men who had murdered her husband. They presented me at that time—I asked if they had any picture, and they showed me a picture of this gentleman. I asked if he had

any criminal background, and they gave me his criminal record. I scanned both of these things and then passed them back to the officers.

[105] Q. What time of the day was it when this arrest was effected?

A. Approximately six a.m. on the morning of the 29th.

Q. How did you post your police officers?

A. I posted several of them outside of the building. I went to the back door.

Q. Who accompanied you into the house?

A. When we got to the back door, I knocked on the door and there was a large glass on the door, and suddenly the light went on in the kitchen, and a small boy—when the light flickered or went on, I saw the small boy standing in the middle of the kitchen. I said that we were police officers, and asked if James Monroe lived in that apartment, and he said he did.

In the meantime, I said "Will you open the door?" The young boy opened the door, and I said, "Where is James Monroe?" and he said, "Up in the front bedroom."

I proceeded to the front bedroom with my partner and driver, Jerry Sullivan. As we got into the bedroom [106] I had a flashlight in my hand. I don't recall—a light was turned on. I don't recall whether I turned on a flashlight or whether someone turned on a light in the bedroom.

As I proceeded toward the bed in which these two people were sleeping, I kicked something accidentally and I looked down, and it was two quart beer bottles. I believe when I kicked these beer bottles this aroused the occupants of the bed, and they looked up at me, and I said, "Are you James Monroe?" And the man answer, "Yes."

I said, "We want to talk to you; get out of bed," so he got up and I put him in custody of Officer Jerry Sullivan, who testified here, and we walked out to the living room of this apartment. In the meantime—

[107] Q. How was Mr. Monroe dressed when he was brought into the living room?

A. He was wearing a pair of shorts, and a T-shirt.

Q. Did you accompany Mr. Monroe into the living room?

A. I don't recall whether I did or not.

Q. Was Mr. Monroe given any other clothing?

A. He was given a pair of dungaree pants to put on, and I noticed a white substance on the pants, and I said, "Are you a plasterer?" And he said, "Well, I do plastering part-time."

Q. Where was Mrs. Monroe at this time?

A. Mrs. Monroe was in the bed.

Q. What did you do after Mr. Monroe was taken out of the room?

A. I went back into the bedroom and I began looking into a closet for the shirts that were described as having been taken in this robbery and murder.

Q. Who was in the bedroom besides you and Mrs. Monroe?

A. To the best of my knowledge, I was looking into this closet, and the only one that may have been [108] in the room with me was Mrs. Monroe.

Q. Was your driver in the room at that time?

A. He may have been there; I don't know. I know he was in the room at some time.

Q. After you completed that part of your search, what did you do?

A. While I was looking into this closet, Mrs. Monroe said to me, "Will you step out of the bedroom so I can get up?" And I said, "It isn't necessary for you to get out of bed, but if you wish to do so, just wrap the covers around you and get out."

Well, I paid no more attention to her, and I continued looking into this closet. There was some soiled clothing on

the floor, such as may have been underwear and shirts of one sort and another, and I looked at these things. In the interim some children had awakened and they were running about the apartment, and then Mr. Monroe was speaking in a very loud voice and complaining that it would upset his neighbors that [109] we were in his home, and I said to Mr. Monroe, "Your neighbors won't know we were in your apartment if you will just lower your voice. You're the one who is making all of the noise here."

He said, "Well, what am I being arrested for?" And I said, "Your picture has been identified in a robbery," and he said, "I haven't been involved in any robbery."

It was shortly thereafter when we were taking him from the apartment, and he said, "Can I change my clothes?" And I said, "No," I said, "I don't think that would be necessary. You may only be gone a short while and you'll be back."

We then went out of the apartment, and after we took him out of the apartment, handcuffs were placed on him and he was put into a squad car and transported to the Detective Division.

Q. Captain Pape, after he was placed in the squad car, did you ever see Mr. Monroe again?

A. Never saw him until several years later. I never saw him before that.

[110] Q. Did Mrs. Monroe get out of bed?

A. After speaking to Mrs. Monroe, the next time I saw her she was standing in the long hallway just adjacent to this bedroom, and it seems to me that she may have had a bathrobe on, so sometime during the time I was in the closet she apparently must have gotten from bed.

[111] Q. In whose custody was James Monroe—strike that.

In whose custody was James Monroe conveyed from the bedroom to the living room?

A. I believe it may have been my driver, Jerry Sullivan's.

Q. In whose custody was he in the living room?

A. The second Jerry Sullivan.

Q. Did you hear any of the conversation of the children?

A. Yes.

Q. Would you describe it for us, please.

A. Well, the children were running about the apartment shouting obscenities at us, and I said to Mrs. Monroe, I said "Would you ask your children to step into the—go into the back of the apartment there? We don't want any problems."

I don't recall whether she complied with my request or not.

Q. I am sorry. Did the children go to the back?

A. I don't know.

[112] Q. How many children were there, if you recall?

A. Well, it seems to me that there were five or six children.

Q. Do you know their ages, generally?

A. I would say there was one young child, there may have been another one about eight or nine, and then the others were teen-agers.

Q. How long, Captain, were you in the apartment?

A. Roughly, about ten minutes.

Q. Now, Captain, were there thirteen police officers with you when you made this arrest?

A. No, sir, there was not.

Q. You were, though, investigating a murder?

A. That is correct.

Q. And you were making an arrest in connection with a murder?

A. That is correct.

Q. Of supposedly the assailant?

A. The assailant of Mr. Saisi.

[113] Q. Now, did you, in gaining entrance, or your police officers, in gaining entrance to this apartment, break through two doors?

A. No, sir.

Q. Did you break through one door?

A. No, sir.

Q. Did you wake the Monroe couple with flashlights?

A. Not to my recollection. I don't know about that.

Q. Did you or any of your police officers force either Mr. or Mrs. Monroe to leave their bed at gunpoint?

A. No, sir.

Q. Incidentally, were any of the police officers' guns drawn?

A. Well, mine wasn't. I can't speak for the others. I don't know.

Q. Did you keep your gun drawn at all times?

A. No, I did not have my gun drawn.

Q. Did you replace the gun in the holster?

A. I don't wear a holster.

Q. Did you replace your gun?

[114] A. I carry my gun in my pocket.

Q. Did you replace it in your pocket?

A. I didn't have my gun out.

Q. I am terribly sorry, sir. I misunderstood you. You did not have your gun out?

A. No. I did not draw my gun.

Q. At any time?

A. No.

Q. Did you see any other?

A. I did have my hand on it.

Q. In your pocket, though?

A. Right.

Q. Did you point that gun in the pocket at the Monroes?

A. No.

Q. Did you see any police officer with his gun drawn?

A. No, not to my recollection.

[115] Q. Did you see any police officer at gunpoint force either Mr. or Mrs. Monroe to leave their bed?

A. No, sir.

Q. Did you see any police officer force either Mr. or Mrs. Monroe or both to stand naked in the center of the living room?

A. No, sir.

Q. Did the police officers rouse the Monroe children?

A. No, sir.

Q. Was any police officer detailed to take care of the Monroe children?

A. No.

Q. Were the children free to move about?

A. Yes, they were.

Q. Was Mrs. Monroe free to move about?

A. Yes, she was.

Q. Was any police officer detailed to keep her in custody?

A. The only person that wasn't free to move about was Mr. Monroe.

Q. Did you observe any police officer herding the Monroe children into the living room?

A. No.

[116] Q. Did you, sir, strike Mr. Monroe with your flashlight?

A. No, sir.

Q. Did you, sir, strike Mr. Monroe with any instrument?

A. No, sir.

Q. Did you strike Mr. Monroe with your fists?

A. No, sir.

Q. Did you put any hand on Mr. Monroe?

A. No, sir.

Q. Did you, sir, call Mr. Monroe, during the course of this transaction, "nigger" or "black boy"?

A. No, sir.

Q. Did you observe any officer pushing Mrs. Monroe?

A. No, sir.

Q. Did you observe any police officer hitting any of the Monroe children?

A. No, sir.

Q. Did you observe any police officer kicking any of the Monroe children?

A. No, sir.

Q. Did you observe any police officer pushing any of the Monroe children to the floor?

[117] A. No, sir.

Q. Did you observe any police officer ransacking any room in the apartment?

A. The only search made of the room was a normal search, looking for the possibility of a weapon or these shirts that I had related here.

Q. Did you observe any police officers making a search?

A. The only one whose search I can account for is my own. I wasn't observing what the men were doing.

Q. In making your search, what did you do, sir?

A. I went to this closet where there was some clothing, not too many articles of clothing. Some were hanging and some were on the floor.

Q. What did you do with them, sir?

A. I looked at the labels of the clothing, of whatever shirts were in this room, or were in this closet, and there may have been only one or two of them. As a matter of fact, the apartment didn't have too much in it.

Then I looked at the soiled clothing which was lying on the floor of this closet, which only was several [118] articles.

Q. Did you withdraw any of this clothing from the closet?

A. No.

Q. Did you move any of it about?

A. No.

Q. Did you observe any police officer throwing clothing from the closet?

A. No.

Q. Did you observe any police officer dumping drawers?

A. No sir.

Q. Did you observe any police officer ripping mattress covers?

A. No, sir.

Q. You are presently a Captain of Police?

A. That is correct.

Q. In 1958 you were Deputy Chief of Detectives?

A. That is correct.

Q. How long were you Deputy of Detectives?

A. A little over two years, until I was promoted to Captain.

Mr. Kaveny: No further questions.

The Court: You may cross-examine.

[119] Mr. Reuben: May I begin in the morning, your Honor?

The Court: What is that?

Mr. Reuben: May I begin in the morning?

The Court: Let's proceed until four-thirty, and then you can continue in the morning.

Mr. Reuben: All right.

Cross-Examination by Mr. Reuben.

Q. You have not been continuously 33 years on the police force, have you, on active duty, have you, Captain?

A. Well, actually, I eliminated the time that I have been away from the Department.

Q. I see.

A. I have been on the Department 36 years. I was away for four years.

Q. Where did you go?

A. To Arlington-Washington Park, Specialized Management Services, as the Director of Security.

[120] Q. You worked for the race track for many years, sir?

A. Four years under contract.

Q. Then you returned to the Police Department?

A. That is correct.

Q. What were those years?

A. I went to the Specialized Management Services in May of—April, I believe, or May of 1961, and I returned to the Police Department in May of 1965.

Q. So that you were working for Arlington Park at the time that Time Magazine's article that you are suing over here appeared on the stands, is that correct?

A. That is correct.

Q. Now, you said that you did not see Monroe until several years after 1958.

A. Correct.

Q. When was the next time you saw him?

A. In a court room in the old building across the street.

Q. You mean in the Federal Court Building?

A. Correct.

[121] Q. In the Federal Court House that has now been torn down?

A. That is correct.

Q. Is that your testimony?

A. That is correct.

Q. And that is when Mr. Monroe was suing you under the Civil Rights Act in the Federal Court, correct?

A. That is correct.

Q. He recovered a judgment against you, did he not?

A. A small percentage of what he sued us for.

Q. Was he the only one who obtained a judgment against you?

A. To the best of my recollection, yes.

Q. Did Mrs. Monroe obtain a judgment against you?

A. Frankly, I could not say. The suit was—

Q. The judgment was paid, whatever judgment was rendered against you, correct?

A. Not by me.

Q. But it was paid, was it not, Captain?

[122] A. Correct, by the City of Chicago.

Q. Now, is it not the fact that when you walked into the Monroe bedroom, you turned a flashlight on?

A. I don't recall whether I did or I did not.

Q. Do you recall giving your deposition in this case on June 22nd, 1964, in my office—

A. I recall—

Q. Please let me finish, Captain—at the hour of [illegible] o'clock in the afternoon?

A. I do recall being at your office.

Q. And you recall that you were sworn under oath to tell the truth?

A. That is correct.

Q. And you recall that in my office your lawyer was present, Mr. Kaveny?

A. That is correct.

Q. Now, do you recall whether these questions were asked of you and you made these answers. I was questioning you, Captain.

"Q. And you walked right in."

And you said under oath:

"A. Yes.

"Q. And when you walked in, your turned your [123] flashlight on the occupants in the bedroom in the bed, right?

"A. I may have. I imagine so."

A. Well—

Q. Please, Captain.

"Q. Well, the fact is that you did.

"A. Well, that would the the normal procedure, if I had a flashlight, to turn it on.

"Q. You testified before Judge Parsons in answer to this question:

'Did you turn your flashlight on when you got in the bedroom?

'A. I would say so.'

"Was that your answer?

"A. Well, I would say that I did, yes. That is the answer that I gave."

Now, do you recall being asked those questions on your deposition and giving those answers under oath, Captain?

A. Well, I might say this—

[124] Mr. Reuben: I would like, if your Honor please, to have the witness answer the question.

The Court: Answer the question, sir, yes or no—

The Witness: Do you want me to answer the question?

The Court: —if you can.

By the Witness: A. It seems to me that he was asking the questions and made the answers. He was asking me if I did certain things, your Honor.

The Court: Answer the question, sir, that was put to you. Answer yes or no, if you can.

The Witness: Then you will have to repeat it.

The Court: Will you repeat the question—read the question, please, Mr. Reporter.

Q. (Read by the reporter.)

By the witness: A. I may have.

[125] By Mr. Reuben: Q. Now, was there a baby in the apartment when you made your raid, sir?

A. Well, to the best of my recollection, I thought there

was a young child sleeping in a basket. In discussion with other officers, they don't seem to remember that.

Q. Wasn't there a sleeping baby somewhere in a corner of the partment, Captain?

A. I thought that there was.

Q. Now, didn't one of the small Monroe children fall over an officer's foot?

A. No. I did not see that.

Q. You did not?

A. No.

Q. Do you recall in the same deposition, Captain, that I asked you about before, you were asked these questions under oath—

The Court: What page, Mr. Reuben, so counsel can follow you?

Mr. Reuben: Page 63.

By Mr. Reuben: Q. (Reading:) "Which one of [126] the officers tripped the little boy?

"A. No officer tripped a little boy, and I think that the testimony, as it was borne out in the case, indicated that the boy was not tripped by any officer.

"Q. You mean he just fell?

"A. Well, as I understand it, the youngster was coming through the hallway and fell over the officer's foot."

Now, were you asked those questions and did you make those answers at your deposition and while you were under oath?

A. Yes.

Q. Now, who searched the bedroom of the Monroes' apartment?

A. Well, there were several bedrooms there.

Q. Who searched the Monroes' bedroom, Officer?

A. I was one of the officers.

Q. Did you search the bedroom?

A. Yes. I was one of the officers.

[127] Q. Are you the only one who searched the bedroom?

A. Well, Sullivan was in there, and it is possible that he may have also searched.

Q. So that both of you searched the bedroom?

A. That is possible.

Q. Well, which part did you search and which part did Sullivan search?

A. I searched—as I explained here, I searched the closet.

Q. What did Sullivan search?

A. I couldn't say.

Q. Well, wasn't he under your command?

A. That is correct.

Q. Wasn't he your chauffeur?

A. Yes.

Q. And it is your testimony that you don't know what Sullivan searched in the bedroom that morning?

A. I don't direct Sullivan, what searches he is to make.

Q. So you do not know what Officer Sullivan did?

[128] A. No, I do not.

Q. He might have searched the same thing you did?

A. It is possible.

Q. So that the bedroom may have been searched twice, is that your testimony?

A. That is possible; yes, that is possible.

Q. Isn't it a fact that the whole apartment may have been searched twice?

A. That's possible.

Q. And this was done very gently and very orderly, is that your testimony?

A. I would say so.

Q. Nothing was left on the floor?

A. Well, the only thing that was left on the floor in the closet that I looked at was the things that were already there.

Q. You didn't drop anything on the floor?

A. No.

Q. You were very orderly in your search?

A. There wasn't much to search there.

Q. Yet it was searched twice, is that correct?

[129] A. I don't know that.

Mr. Kaveny: Objection, your Honor.

The Court: He has already answered.

[130] By Mr. Reuben: Q. Now, you were going to arrest an accused murderer, is that correct?

A. That is correct.

Q. So far as you were concerned, an eyewitness had identified James Monroe as the perpetrator of a murder, is that correct?

A. That is correct.

Q. And you, of course, then went there armed?

A. That is correct.

Q. And you were prepared to draw your gun and shoot if there was any resistance, I take it?

A. I don't know what—

Mr. Kaveny: Objection. That calls for the witness' speculation, your Honor.

The Court: If he knows, he may answer.

Mr. Kaveny: What he would do?

The Court: Yes. If he knows what he would do, he may answer.

By the witness: A. I don't know what to expect when you go into these places.

[131] By Mr. Reuben: Q. You were prepared for anything, weren't you?

A. Well, that's what we're supposed to be.

Q. Sure. You went in and put your flashlight on Mr. Monroe and woke him up by kicking something, is that correct?

A. I said I accidentally kicked two bottles of beer. Whether I awakened Mr. and Mrs. Monroe with my flashlight or not, I don't know.

Q. Well, they were asleep at the time you walked in the bedroom, weren't they?

A. I wouldn't know that.

Q. They were in bed?

A. They were in bed, yes, sir.

Q. And you did not know whether they were asleep?

A. No.

Q. Do you recall in your deposition being asked the following question—

Mr. Kaveny: What page, please?

Mr. Reuben: 54, sir.

[132] By Mr. Reuben: Q. (Continuing)—and giving the following answer under oath:

"Q. But at least when you got to the bedroom door they were asleep, before you kicked the beer?

"A. They may have been. I would say so."

Were you asked that question and did you make that answer under oath, Officer Pape?

A. I believe so.

The Court: Do you want to take a recess now?

Mr. Reuben: Yes, your Honor.

[133] The Court: You will be excused, sir, until ten o'clock tomorrow morning. You are directed not to discuss your testimony with anybody between now and then. Thank you.

Ladies and gentlemen of the jury, you will now be excused until ten o'clock tomorrow morning. I ask that you

remember the admonition I gave to you after you had been chosen as jurors, about not discussing this matter with any members of your family or anybody on the outside, and if anything should appear in the newspapers or on radio and television, not to read, listen to or view it. Thank you and goodnight.

We will recess until ten o'clock tomorrow morning, and I will see counsel in chambers for just a few moments.

(Whereupon the trial of the above-entitled cause was adjourned to Tuesday, January 14, 1969, at the hour of 10:00 o'clock a.m.)

[134] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—Docket No. 61 C 2202) * *

(Filed March 18, 1969)

Before Hon. Edwin A. Robson,
Judge, and a jury.
Tuesday, January 14, 1969,
10:45 o'clock a.m.

Met pursuant to an adjournment.

Present:

Mr. Kaveny, appeared for Plaintiff;

Mr. Reuben, appeared for Defendant.

(Whereupon the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

[135] The Clerk: 61 C 2202, Frank Pape against Time, Inc., case on trial.

The Court: Good morning, ladies and gentlemen of the jury.

Good morning, Counsel.

Are you ready to proceed, Mr. Reuben?

Mr. Reuben: I am, your Honor.

The Court: Will the witness take the stand.

FRANK W. PAPE, the plaintiff herein, called as a witness in his own behalf, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Cross-Examination by Mr. Reuben.

Q. You are, of course, the same Captain Pape who testified here last night?

A. That's correct, sir.

Q. You understand that you are still under oath?

A. Yes, I do.

Q. Let me for a moment call your attention to November of 1961 when the TIME article that you are [136] suing about appeared. You did not know any people in the Editorial Department of TIME magazine at that time, did you?

A. Well, frankly, I don't know the employees of TIME Magazine, who all their employees are, so I don't really know whether I know anybody connected with TIME or not.

Q. As far as you know, you do not know anybody, is that your answer?

A. That's correct.

Q. Now, Captain, what I would like to do for the Court and for the Jury is to go over and reconstruct just what happened so far as you can tell us in October of 1958.

Let me ask you this first: When did you first learn that Mrs. Saisi had identified or stated that two persons had killed her husband?

A. I believe it was the day of the murder, somewhere on toward late evening. I believe that may have been October 27th, if I'm—

Q. Are we talking about a day or two before the visit or

raid or arrest at the Monroe apartment? [137] A. That's correct.

Q. Therefore, you were told that Mrs. Saisi's story was that two men, two Negro men, had killed her husband, correct?

A. I was told this by Mrs. Saisi.

Q. Oh, you interviewed her directly?

A. That's correct.

Q. She told it to you?

A. That's correct.

Q. Did she also identify the picture of James Monroe in your presence?

A. No, sir.

Q. When were you told that James Monroe had been identified by Mrs. Saisi?

A. I believe it was the 28th or 29th of October, one or two days later.

Q. We are dealing with the evening of the 28th or the morning of the 29th, is that correct?

A. To the best of my recollection.

Q. Who told you that?

A. One of the officers who was assigned to the investigation.

Q. How soon afterward did you learn that the [138] man, Monroe, who had been identified, had a police record?

A. At the time that I was told that she had identified the picture.

Q. So, you were told that Mrs. Saisi, in effect, had accused Monroe of murder, and you at the same time learned that Monroe had a police record with the City of Chicago?

A. She identified his picture as being that of one of the men who had murdered her husband.

[139] Q. Now, that was about what time of the evening, Captain?

A. Well, I was working the midnight shift, and I would say roughly about 11:00 o'clock, 11:30.

Q. So that would be 11:30 p.m. on the night of the 27th of October, 1958?

A. Not the night of the 27th.

Q. The night of the 28th?

A. The 28th or 29th. I am not certain of which.

Q. What date did the raid occur?

Mr. Kaveny: Objection, your Honor.

Mr. Reuben: I am sorry.

Mr. Kaveny: I am sure you are, counsel.

By Mr. Reuben: Q. What day did you visit the Monroe apartment?

A. To the best of my recollection, the 29th of October.

Q. So that was the evening of October 28th, 1958, about 11:30 p.m., that you were told of the identification of James Monroe, is that correct?

A. To the best of my recollection, yes.

Q. Who gave the order to pick him up?

A. Sergeant Cagney, who testified here.

[140] Q. Was there an address for Mr. Monroe in the police files?

A. Yes, there was.

Q. What was that address?

A. 1424 South Trumbull Avenue, City of Chicago.

Q. What police district is that in, sir?

A. The Fillmore Police District.

Q. Is the Fillmore District, in the vernacular of the Police Department, a high crime rate district?

Mr. Kaveny: Objection.

The Court: He may answer, if he knows.

By the Witness: A. I would say yes.

By Mr. Reuben: Q. That is not a neighborhood that you normally could go sojourning in at night by yourself, I take it?

Mr. Kaveny: Objection, your Honor.

The Court: The objection is sustained.

[141] By Mr. Reuben: Q. What was the next thing that happened so far as you know?

A. After when?

Q. After you were told that Mr. Monroe had been identified by Mrs. Saisi as one of the murderers?

A. At the time I was told that, I was in my office.

Q. Yes, sir. What did you do next?

A. I then instructed the officers who relayed this information to me to go to the home some time between maybe midnight that evening and 5:30 or four o'clock the next morning for the purpose of determining the premises where Mr. Monroe lived, as to what kind of structure it was.

Q. Kind of a reconnoitering or a reconnaissance sort of thing, is that right?

A. No, I wouldn't explain it as that.

Q. What were the officers that you wanted to go to the Trumbull—to the Monroe apartment—to do?

A. To see what kind of building he lived in, what [142] the structure was like.

Q. What was the purpose of that?

A. To determine how it would be—how many men might be necessary to cover it, and the manner in which it should be covered.

Q. How many officers in fact went?

A. Went where?

Q. To the apartment.

A. Well, when?

Q. On the reconnoitering—to look the apartment over! How many officers went?

A. You mean to obtain this information?

Q. Yes.

A. Two officers, to the best of my knowledge.

Q. Those were homicide officers?

A. That's correct.

Q. Were you told at the time who they were?

A. I am quite certain I know who they were.

Q. Did they subsequently report back concerning their observations at Mr. Monroe's apartment?

[143] A. Yes, they did. I don't recall whether it was in person or by telephone.

Q. About what time was that?

A. I wouldn't recall. That was eleven years ago.

Q. Would we be dealing, then, with the morning of the 29th?

A. I would say so.

Q. Would you say it was—well, how many hours before you went to the Monroe Apartment? Can you fix it?

A. I couldn't remember back as to when they called me or when they reported back to me.

Q. What was the report?

A. The fact that it was a three-story brick building and contained many apartments.

Q. What did you next do in connection with the proposed arrest?

A. I believe I told these men that I would meet them in the vicinity of Roosevelt Road and St. Louis Avenue at about six a.m. in the morning.

Q. The two men that called and reported—

A. The two men that reported, plus the other [144] four officers that testified here in this case.

Q. Who assigned the other four officers to rendezvous at St. Louis and Roosevelt?

A. Cagney, Sergeant Cagney, who testified.

Q. Did you know that four more officers were going to meet as well as the two and yourself?

A. I believe I did, to the best of my recollection.

[145] Q. So that when you started out, you started out—

when you started out to the Monroe apartment, you started out with knowledge that eight police officers would be involved in the arrest, is that correct?

A. Six officers, plus myself and my driver.

Q. Or a total of eight?

A. Or a total of eight.

Q. Six and two make eight? We can agree on that. How were you dressed that morning?

A. Frankly, I don't remember. This was eleven years ago.

Q. Did you have a coat on, civilian clothes?

A. I was in civilian clothes, yes.

Q. Did you have a trench coat or overcoat?

A. I may have. I don't remember.

Q. What was the weather like that day?

A. It was rather cool, as I recall.

Q. Was it foggy or clear?

A. Well, I don't remember that.

Q. Was it raining or precipitation or snow?

A. I don't remember that.

Q. How was your driver dressed?

[146] A. I don't know.

Q. Was your chauffeur wearing a police uniform or plain clothes?

A. No, sir. No one was wearing a police uniform.

Q. Where was your office, Captain?

A. On the third floor of the Detective Bureau at the north end.

Q. Where is the Detective Bureau located?

A. 1121 South State Street.

Q. So your chauffeur drove you from 1121 South State to St. Louis and Roosevelt—

A. In that area, yes, sir.

Q. You left the department about 4:30, or something, to make a 5:00 o'clock rendezvous, is that correct?

A. I don't recall. I know we arrived there—we were scheduled to arrive there somewhere in the vicinity of 6:00 a.m. in the morning.

Q. Arrive where? At St. Louis and Roosevelt?

A. That's correct.

Q. Or at the Monroe apartment?

A. No, the vicinity of St. Louis and Roosevelt.

Q. I take it the two officers who had viewed the apartment at your instructions earlier in the evening had an automobile, is that correct?

A. Yes, sir.

[147] Q. The four other officers that were going to meet you there, did they have one or two automobiles between them?

A. I don't know, sir.

Q. When you met at St. Louis and Roosevelt, how many automobiles were there?

A. I don't know, sir.

Q. Were there three or four?

A. I don't know, sir.

Q. You can't remember? Was your automobile marked?

A. No, sir.

Q. Yours was an unmarked automobile?

A. That's right, sir.

Q. How about the other automobiles that you met?

A. They were unmarked, also.

Q. So that there were no marked automobiles?

A. That's correct, sir.

Q. Did all four automobiles then proceed to the Monroe apartment building?

A. I didn't say there were four automobiles.

Q. Well—

A. I don't know how many cars there were.

[148] Q. Did all of the automobiles proceed there?

A. Whatever cars were there did proceed. I would like to correct something, that I don't know whether some

officers got into—in other words, I don't know that they doubled up and how many cars proceeded to the address of the Monroes. I don't know. I don't recollect at this time.

[149] Q. Therefore, it could have been anywhere from two to four, is that your testimony?

A. That's possible.

Mr. Kaveny: Your Honor, the witness has not so testified.

The Court: He asked the question and the witness answered.

Mr. Kaveny: May I have the answer read.

The Court: Will you read the answer, please.

A. (Read by the reporter.)

Mr. Kaveny: I move that the answer be stricken, your Honor. The witness has testified that he did not know how many cars, and now Mr. Reuben has said that there were from two to four cars.

The Court: It may stand. Proceed.

By Mr. Reuben: Q. Were you armed?

A. Yes, sir.

Q. How many guns did you carry?

A. I normally carry one.

Q. How many guns did you carry that night?

[150] A. I don't remember.

Q. It might have been more than one, is that your testimony?

A. It may have been. I usually carry a gun in the glove compartment of the squad that I use.

Q. That would be a second gun?

A. That's right, sir.

Q. What caliber was the gun or guns that you had?

A. Possibly a .38 and a .44 caliber pistol.

Q. Did you carry any other weapon with you?

A. No, I did not.

Q. Did you carry a flashlight?

A. Yes, I did.

Q. Would you describe the flashlight? Was it one of those great big face types with three or four batteries?

A. No, sir. It was just a small, ordinary flashlight you would use around the home.

Q. I see. That is the one they usually issue to the police?

[151] A. They don't issue any flashlights to the police.

Q. This was your own flashlight?

A. That's correct, sir.

Q. How was your driver armed?

A. Well, I am certain that he had a weapon on. That's department regulations, but how he was armed, I don't know.

Q. Did you ask him if he was armed?

A. No, sir.

Q. How about the other six officers? Were they armed?

A. I presume they were. That was the orders of the Police Department.

Q. Do you know what arms they had?

A. No, I do not.

Q. Did you make any inquiry of any of the members of the detail as to what arms they had?

A. No, I did not.

Q. Did any of them have, for example, billies or blackjacks, small ones that they might have carried?

A. I couldn't answer that, sir.

[152] Q. You do not know?

A. I do not know.

Q. About what time did you arrive at the front of the Monroe apartment building?

A. I would say roughly about six, 6:15 in the morning, or thereabouts; somewhere in that area, 6:30. I'm not certain.

Q. Then everybody, I take it, got out of their respective automobile or automobiles, correct?

A. I would say so.

Q. You parked in front of the house, is that correct?

A. No. To the best of my recollection, one car drove in the alley in the back of this apartment building.

Q. One car drove in the alley?

A. One or possibly two. I'm not certain. This happened eleven years ago.

Q. How many cars parked in front of the house?

A. I couldn't answer that, sir. Possibly the remainder, whatever there was.

[153] Q. Six o'clock in the morning is generally the best time to pick up people, is it not?

A. That's correct, sir. It's daybreak.

Q. Was it daybreak that morning?

A. I would say at about that time.

Q. Now, was it prearranged that two cars would go into the alley? Which two cars went into the alley and how did they know to go into the alley?

A. I think I would possibly, when we met at St. Louis and Roosevelt, delegate which cars would go in the back and which cars would remain at the front.

Q. Did you give any other instructions when you all rendezvoused at St. Louis and Roosevelt other than where the cars would be parked?

A. I don't recall.

Q. At any time did you give any instructions concerning what each officer's assignment would be in connection with the arrest?

A. I would say yes, that I posted some men. This is police practice. I posted the men in the back and front of the place before we entered.

Q. Captain, my question is: At any time did you give them instructions?

[154] A. I would say yes.

Q. Where was that? Was it in front of the house or was that at Roosevelt and St. Louis?

A. Frankly. I don't remember, but the instructions were given.

Q. How did you post the men? Where did you assign them?

A. Well, to the best of my recollection, two men were posted in the rear of this building, maybe in the gangway, maybe in the alley; two men posted in the front of the building, possibly one in the hallway, possibly one on the gangway which leads out to the front of the building, and the remainder went to the back door.

Q. Of the men who were in the back, you say one was in the alley?

A. Possibly.

Q. Do you remember?

A. Only through recollection of Officer Conway testifying here and these officers testified as to their positions. That to some degree did refresh my recollection.

Q. Your recollection having been refreshed, who was assigned to the back alley?

[155] A. I believe it was Conway.

Q. Where was he supposed to be in relation to the Monroe—

Were there back stairs?

A. No. He went down or—no.

Q. It was a basement apartment?

A. It was a basement apartment. He went directly into the apartment from the sidewalk.

Mr. Reuben: I am sorry. Will you read the answer, please.

The Court: Will you read the answer, please.

A. (Read by the reporter.)

Mr. Reuben: Thank you.

By Mr. Reuben: Q. There were no stairs going down?

A. On the inside of the apartment there was stairs as you enter the apartment proper. There were stairs leading into the kitchen after you got through the door.

Q. Where did you post Officer Conway?

A. He was in the rear somewhere, to the best of my recollection.

Q. Was he on the sidewalk or at the back door?

[156] A. It seems to me he was away from the back door.

Q. Therefore, he would be on the sidewalk or near the back stairs, is that your testimony?

A. Possibly in the gangway close to the alley.

[157] Q. What was his job or assignment? Why was he posted there?

A. Well, to prevent the possible escape of anybody out of this apartment.

Q. Out of the back?

A. That is correct.

Q. Was there another officer besides Officer Conway assigned by you to the back?

A. To the best of my recollection there were two posted in the back and two in the front.

Q. Where was the other man posted?

A. I couldn't say that.

Q. Was he with Officer Conway or did he have a separate post?

A. He was assigned to the rear. Where he was exactly, I couldn't say at this time.

Q. What I am asking you is, would there be two officers, Officer Conway and another together, or would they spread out, or don't you know?

A. There would be two officers at the back of this apartment building, and two officers at the front. Other than that, I can't say.

Q. Who was the other officer at the back with [158] Officer Conway?

A. It seems to me it may have been Prunckle, but I'm not certain.

Q. Did you tell each of them to stop anybody that tried to flee from the back of the apartment?

A. Yes.

Q. That was their assignment?

A. That's correct.

Q. Regarding the officers who were in the front, where were they assigned?

A. One, I believe, was assigned to the gangway which led onto the street. The other was assigned into the hallway, which could have led into the apartment.

Q. You mean that there was an outer door into a hallway and then there was a door into the Monroes' apartment?

Is that correct?

A. Well, I wasn't in there. I assume that that's probably what the situation was.

Q. Which man did you tell to be inside the front hall?

A. That may have been Felker, but I'm not certain. [159] Q. Who was to be out on the street by the front door?

A. I don't know which one.

Q. The other man, at any rate, other than Felker?

A. That's correct, sir.

Q. What was their assignment?

A. Well, to prevent anybody from fleeing from this particular apartment. That window was right off practically the street level and the gangway level.

Q. So that you took the precaution of protecting both the back and the front?

A. That's correct, sir.

Q. What did the other four officers, including yourself, do?

A. We went to the back door.

Q. Did you at that time have any idea of the layout of the Monroe apartment before you entered?

A. All I knew was that he lived in this basement flat; of the inside structure, I knew nothing.

[160] Q. Did you have any idea of the number of rooms?

A. No.

Q. Or where any of the rooms were?

A. No, sir.

Q. Is it not a fact that you did not know how many men were in this home or how many people you were going to encounter when you went into this home?

A. That's correct, sir.

Q. You knew that you were looking for two murderers, did you not?

A. Well, I knew one of the men whose picture had been identified lived there. How many people we would have encountered in this apartment, we had no way of knowing.

Q. However, Mrs. Saisi had told you there were two people?

A. That's correct.

Q. Therefore, you had, I take it, some concern that the other murderer might be with Monroe in the apartment, is that correct?

A. Well, I don't think from a picture identification you definitely have enough evidence that a man [161] is guilty of a murder.

Q. Certainly, he is an accused murderer, is he not?

A. His picture is identified as being a man who participated in a murder. I don't know if that is an accusation or not, Counsel.

Q. You knew that that was the residence of a man who was identified as having participated in a murder?

A. Whose picture had been identified.

Q. For all you knew, his alleged accomplice might have been in the apartment as well, is that correct?

A. That's possible.

Q. You went to the back door, is that correct?

A. That's correct, sir.

Q. Why did you select the back door?

A. Well, simply because that door led directly into the apartment. The front door led into a vestibule, and there was no access to the apartment through either of these two doors, and then again, this rear door had a glass in it, although I might say I didn't know [162] at the time I went to the back that it had a glass in it, but this door led directly into the apartment, the rear door.

[163] Q. What instructions did you give the other three men with you that were going to the back door with you?

A. I don't remember giving them any instructions. I knocked on the door.

Q. No, no, no. You are anticipating me. What were they to do? They were behind you, were they? Were they alongside of you? Were they two abreast?

A. They were behind me.

Q. There were three men behind you?

A. That's correct.

Q. Three police officers? What did you tell them that they were to do?

A. It wasn't necessary for me to tell them anything to do.

Q. What were they to do when you gained access to the apartment? Did you tell them?

A. No. They knew what to do. These were homicide men who had investigated this matter.

Q. Were all of these men stationed down at 11th and State as homicide men?

A. That's correct, sir.

Q. So all of them came from 11th and State out to Mr. Monroe's house to pick him up?

[164] A. That's correct, sir.

Q. A distance of what, about six miles?

A. Approximately.

Q. Nobody came from the local district, the Fillmore District, to pick this man up?

A. No, sir.

Q. When you approached the door, did you have your flashlight in your hand?

A. I presume I did.

Q. Did you have your gun in your hand?

A. No, sir.

Q. Did you have your hand on your gun?

A. Yes, sir.

Q. What did you do?

A. I knocked on the door.

Q. How did you knock?

A. With my knuckles.

Q. Did you knock hard? Could you knock for me and show how hard you knocked on the door, to show the jury?

A. I knocked in an ordinary manner (indicating).

Q. Did you give it a loud knock or a social knock? What kind of knock was it?

A. I don't remember. I just knocked on the door, [165] and there was a response to my knock.

Q. You are looking for an accused murderer, and you have three officers behind you. Did you knock hard?

A. No.

Q. Could you knock on the bench and show me how you knocked?

A. I suppose I knocked as any person would (indicating).

Q. Just a social knock?

A. Is there a social knock?

Mr. Kaveny: Objection.

The Court: Are you objecting?

Mr. Kaveny: The gentleman asked him to knock, and he knocked, and counsel characterized it as a social knock. I object to the characterization by counsel.

The Court: Objection sustained.

By Mr. Reuben: Q. You would say it was a kind of muted knock?

Mr. Kaveny: Objection, for the same reason, your Honor.

The Court: If he knows, he may answer.

By the witness: A. I just knocked on the door, [166] and there was a response to my knock.

Q. What then happened?

A. Suddenly a light was turned on in the apartment. It was dark inside the apartment. There was a small boy, as I recall. It was a sort of chain attachment. When the light went on I saw this small boy under the light fixture. I had my star—

Q. Just a moment. You saw a small boy, and the light went on?

A. Yes. The light went on, and then I saw the small boy.

Q. You couldn't see in the apartment until the boy put the light on?

A. That's correct.

Q. How old would you say this boy was?

A. I would say he was a youngster, about twelve years of age.

Q. Did he come to the door?

A. Yes, he did.

Q. Did you have a conversation with him?

A. Yes.

Q. What did you say?

A. I put my star up and said we were police officers, and does James Monroe live here?

[167] Q. You could talk through the glass, could you?

A. That's correct.

Q. Just tell us now how, during this early morning in this apartment—give us as best you can for the jury's sake the tone of voice and how loud or how soft you were. Just pretend for a moment that I am that boy, if you will, Captain Pape, and tell me that you are a police officer and want me to open the door. Will you do it just as you did it that morning, to reconstruct it as best you can?

A. Well, I knocked on the door, and the light was turned on. This young boy was up rather close to the door. The light fixture was in about the center of the kitchen. It was a small kitchen, so he was rather close to the door.

I said, "Police officers. Does James Monroe live here?" In about that tone of voice.

Q. In about that loudness?

A. Yes.

Q. Very polite?

A. I would say so. Well, I was speaking to a [168] youngster.

Q. Yes, sir.

A. And he came to the door—

Q. There is no question pending.

The Court: Let the witness finish the answer, Mr. Reuben.

Mr. Reuben: I'm sorry.

By the Witness: A. He came to the door, and I asked him if James Monroe lived there. He hadn't opened the door then. That is to the best of my recollection. He then opened the door, and I said, "Where is James Monroe?" He said, "In the front bedroom." Whether he led us to this bedroom or whether we proceeded ourselves, my driver Jerry Sullivan and myself, up the long hallway—

the bedroom was up to the front of the apartment—whether he led us or whether we just went to this bedroom that he had indicated, I don't recall.

Q. Are you now through with your answer?

A. If that answers your question.

Q. Not quite. You then said, in a normal conversational tone to this boy, "We are police officers. [169] Is James Monroe here?" through the glass, is that correct?

Mr. Kaveny: Objection, your Honor. It has been asked and answered.

The Court: He may repeat it. Proceed.

The Witness: Would you repeat the question, please?

The Court: Read the question.

Q. (Read by the reporter.)

By the Witness: A. I would say so, yes.

[170] By Mr. Reuben: Q. And the boy immediately opened the door, is that your testimony?

A. I believe I asked him to open the door.

Q. And he immediately complied?

A. Yes.

Q. Were you at all concerned that instead of opening the door, he might have gone back into the apartment—

A. No.

Q. Let me finish—and given some alarm to the remaining occupants?

Mr. Kaveny: Objection, your Honor.

The Court: He may answer, if he knows.

The Witness: Would you repeat the question?

The Court: Read the question.

Q. (Read by the reporter.)

By the Witness: Q. That is a hazard of the occupation. That could have happened.

By Mr. Reuben: Q. Did you take any precaution so that after the boy saw your star he wouldn't turn around and give alarm, and you would have a different [171]

problem on your hands? Was any precaution taken to avoid that possibility?

A. I don't recall that any precaution was taken. I suppose that the loud voice you talk about and the loud pounding—an experienced police officer wouldn't do that on a door for the sake of arousing maybe the person he was seeking and causing a problem.

Q. So that your answer is you took no precaution to prevent the boy, before opening the door and upon seeing your star and knowing you were police officers looking for James Monroe, turning around and going into the rear of the apartment and giving an alarm, is that correct?

Mr. Kaveny: Objection, your Honor.

The Court: He may answer.

By the Witness: A. What precaution could you take?

The Court: Answer the question.

By the Witness: A. Well, I don't know what he is speaking about, your Honor.

The Court: Read the question.

Q. (Read by the reporter.)

[172] By the Witness: A. There was no precaution you could take. We were on the outside. He was on the inside.

By Mr. Reuben: Q. What would you have done, sir, had the boy refused you entry to the apartment?

Mr. Kaveny: Objection, your Honor.

The Court: He may answer.

By the Witness: A. I don't know. I wasn't refused admission to the apartment.

By Mr. Reuben: Q. In other words, you don't know whether you would have broken down the door or left, is that your testimony?

A. That's correct.

Mr. Kaveny: Objection, your Honor.

The Court: It may stand.

By Mr. Reuben: Q. The next thing that happened is that you gained access?

A. That's correct.

Q. By the boy?

A. That's correct.

[173] Q. Did the other three police officers follow you in?

A. I don't know. The only one I knew that was behind me was my driver, Jerry Sullivan. I wasn't watching to see what other police officers were doing.

Q. You don't know what happened to the other two police officers?

A. No. Not at that moment.

Q. Did you take the boy, when you first gained access, into custody?

A. No.

Q. Well, how did you prevent the boy from giving an outcry or a warning? You didn't know what the boy would do as you walked in. How did you assure yourself, once having gained access, that the boy would not give warning to anybody?

A. There was no way of assuring yourself.

Q. Didn't you take hold of the boy?

A. No.

Q. Or do anything?

A. No.

Q. So it is your testimony that after you gained access, you took no precaution to prevent the boy from [174] going to the other part of the apartment and saying, "The police are here. Run"?

A. No.

Q. You took no precaution?

A. To the best of my knowledge, no.

Q. None whatsoever?

A. The boy may have remained in the kitchen. I don't remember.

[175] Q. You do not remember what happened to the boy?

A. He may have remained in the kitchen. He may have taken us to the bedroom. I don't recollect at this time.

Q. You mean you paid no attention as to the whereabouts or the movements of the first person who let you in the apartment?

A. The twelve-year-old boy, no.

Q. Have you ever heard of a twelve-year-old boy being armed?

Mr. Kaveny: Objection, your Honor.

The Court: He may answer.

By the Witness: A. This boy was in nightclothes, and I am sure he wasn't armed.

By Mr. Reuben: Q. Did you search him?

A. No.

Q. This is a boy in the Fillmore District, and you did not search him? Is that your testimony?

A. That's correct, sir.

Q. What happened to the boy when you gained [176] access?

A. I don't know. I went to the bedroom.

Q. You have no idea?

A. That's correct.

Q. You gained access. You were in a room, weren't you?

A. I was in an apartment.

Q. Well, you were in a particular room as you gained access?

A. I was in the kitchen of this home.

Q. What did you see when you came into the kitchen?

A. I saw a boy, empty half-gallon beer bottles, some dishes on the sink, a refrigerator.

Q. Where did you then go?

A. Directly up the hallway to the place the boy had indicated Mr. Monroe was sleeping.

Q. When did the boy indicate Mr. Monroe was sleeping?

A. When I asked him, when I got into the apartment and asked him where Mr. Monroe was, he either led us to the bedroom or he pointed up the long hallway, and that is where Jerry Sullivan and I went.

[177] Q. In other words, you did stop and talk to the boy in the kitchen?

A. I asked him—

Q. You had a second conversation with the boy in the kitchen?

A. That's correct.

Q. Well, we got that out.

Mr. Kaveny: Objection.

By Mr. Reuben: Q. What did you say to the boy? And what did the boy say to you?

A. I just said, "Where is James Monroe?" And he said, "In the bedroom in the front." I repeat again, I don't know whether he led us to the bedroom or whether we just walked up the long hallway and walked into the bedroom.

Q. You just paid no further attention to the boy?

A. That's correct, sir.

Q. When you went up the hall, did you run up, or did you walk up?

A. Walked up. I would say rather hurriedly.

Q. As quickly as you could, I would assume.

[178] A. Yes, sir.

Q. What did you have in your hands?

A. The flashlight.

Q. Did you have your hand on your gun?

A. Yes, I did.

Q. What about Officer Sullivan?

A. I can't speak for Sullivan. Sullivan was behind me.

Q. Where were the other two officers?

A. To the best of my recollection, they remained at the rear door.

Q. You mean the two that accompanied you in?

A. Right.

Q. Did you look over your shoulder to see them?

A. No.

Q. Did they hold the boy at the rear door?

A. I couldn't say anything about that. I did not see them.

[179] Q. Was the bedroom the first door up the hall, or were there other doors before you got to the bedroom?

A. To the best of my recollection, there was a door right off the kitchen to the left as we entered, and then up this long hall at the end of this long hall, as you approached the dining room, there was another door, and this is the bedroom where Mr. and Mrs. Monroe were.

Q. So there was a doorway on your left—

A. To the best of my recollection.

Q. This is pretty important. As much as you could remember would be very helpful, Captain.

A. This is eleven years ago, Mr. Reuben.

Q. Did anybody go to that left door?

A. I couldn't say. The boy indicated that Mr. Monroe was up at the end of the hallway.

Q. Weren't you concerned that somebody in that left doorway might have come out of there and let a shot loose?

A. Well, you are always concerned.

Q. What precaution did you take?

A. I didn't take any precaution.

Q. So your testimony is that you rushed right [180] to the door indicated by the boy and didn't look at any other doorways?

A. That's correct.

Q. And didn't see who was in any other doorways?

A. I was with three experienced other officers, with great experience, and they possibly may have watched the other bedroom. I don't know.

Q. Wait a minute. I am confused now. I thought the two officers remained in the kitchen. That was your testimony just a moment ago, wasn't it?

A. Yes. That's correct.

Q. Then who was going to protect your flank, as you went up the hall, from that left-hand doorway?

A. The doorway was right at the kitchen, Mr. Reuben. The doorway was right at the kitchen, the place we first entered.

Q. So that you had police officers who were going to watch both the kitchen and that left-hand doorway, is that it?

A. I assume they are experienced men. They have been on this type of investigation before, and they know their business.

Q. You don't know what happened, is that your testimony?

[181] Mr. Kaveny: Objection.

By Mr. Reuben: Q. As to observing of that left-hand door?

The Court: He may answer.

By the Witness: A. I wasn't watching the door. I was on my way to the room where Mr. Monroe was.

Q. Let me ask you a question: Were there people in that left-hand doorway?

A. I believe later there were some children in that area.

Q. I mean when you went up the hall, the first time.

A. I don't know.

Q. To arrest Monroe.

A. I don't know.

Q. So there might have been?

A. There may have been, yes.

Q. You never looked to see, is that your testimony?

A. Yes, sir.

Q. You were satisfied to go where the boy had indicated without looking to the right or to the left? Is that your testimony?

[182] A. I was satisfied that the men who followed me would cover me.

Q. You were in front of them?

A. That's correct.

Q. Now, there was a doorway to the left. Was the bedroom the next doorway?

A. I don't remember exactly. I know there was a doorway on the left right off the kitchen, and then there was another doorway up at the end of the hall which led into the bedroom where Mr. and Mrs. Monroe was.

Q. Was there any other doorway besides the door on the left between the kitchen and the Monroe bedroom?

A. It seems to me there was a closet door on the right, but I am not certain of that.

[183] Q. Did you look in that closet?

A. Not I, no.

Q. On the way up, did you look—

A. No.

Q. Did you know whether that was a room or a closet as you went up the hall to arrest Monroe?

A. I didn't know.

Q. So that you just went very hurriedly up to the Monroe bedroom, is that correct?

A. That's correct, sir. The way I had indicated.

Q. At the time you didn't know it was Monroe's bedroom?

A. Oh, yes. The boy told me that was his bedroom up at the end of the hall.

Q. I thought the boy just pointed. What did the boy

say? "That is James Monroe's bedroom up at the end of the hall there"?

A. Mr. Reuben, I think I stated that the boy either led us to this room or pointed to the room.

Q. But you now said the boy told you that that was Mr. Monroe's bedroom. I am asking you to give [184] that conversation.

A. I said that before, that the boy told us Mr. Monroe was at the end of the hall in that bedroom, or he led us to it.

Q. You are not sure now whether the boy told you it was a bedroom, is that it?

A. Well, he somehow or other got to us that Mr. Monroe was in that bedroom. Whether he led us, or whether he told us, it was the first place we went looking for Mr. Monroe, and he was there.

Q. Was the door closed, or was the door open?

A. To the best of my recollection, it was open.

Q. What did you do?

A. Stepped into the bedroom.

Q. Stepped into the Monroes' bedroom?

A. Correct.

Q. Was there somebody behind you?

A. Jerry Sullivan, I believe. I wasn't looking to see who was behind me. I was looking to see who was in front of me.

Q. So it could have been somebody else.

[185] A. No. I was sure it would be a police officer.

Q. Did you hear footsteps behind you?

A. I wasn't listening for footsteps.

Q. You weren't?

A. No.

Q. When you went into the Monroes' bedroom with Jerry Sullivan behind you, what did you have in your hands?

A. A flashlight.

Q. Did you have your hand on your gun?

A. Right, sir.

Q. Was the room light or dark?

A. When we went to the bedroom, it was dark.

Q. What did you do?

A. I may have turned my flashlight on. I don't remember. Or the light may have been turned on by the boy who accompanied us. Or it may have been turned on by Sullivan. I don't remember.

Q. If the boy accompanied you?

A. If the boy accompanied us.

Q. He is a kind of man or boy in motion.

[186] Mr. Kaveny: Objection, your Honor.

The Court: The objection is sustained.

Mr. Reuben: I withdraw it.

By Mr. Reuben: Q. What did you see in the bedroom?

A. Two persons lying in bed, when the light was turned on.

Q. Were they lying face down on the pillow, face up, or what?

A. Face up, to the best of my recollection.

Q. Did you recognize anybody in the bed?

A. I think I recognized Monroe from the picture.

Q. Could you tell immediately whether the other person was a man or a woman?

A. Yes.

Q. In that instant second?

A. I would say so, sir.

Q. Was Officer Sullivan behind you?

A. He was in the room.

Q. He was with you?

A. Right.

The Court: We will take a five-minute recess.

[187] Take the jury to the jury room.

(A brief recess was thereupon taken, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury:)

[188] The Clerk: Case on trial.

The Court: Are you ready to proceed, Mr. Reuben?

Mr. Reuben: Yes, sir.

The Court: Will the witness take the stand, please.

FRANK PAPE, heretofore called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination by Mr. Reuben (Resumed).

Q. Before the recess we had you and Officer Sullivan in the Monroe bedroom. When you approached the bed, were the eyes of the people in the bed open or closed?

A. I don't know.

Q. Did you approach the bed?

A. As I walked toward the bed I accidentally kicked over these beer bottles, and maybe it aroused them. I don't know.

Q. When you first saw them, were their eyes open or closed?

A. I don't remember that.

Q. You approached the bed with what in your hand?

[189] A. Only a flashlight.

Q. Did you stir the bed or—I will withdraw that.

Which side of the bed did you approach, the left-hand, the right-hand or the foot or the head?

A. As we turned into the bedroom the man was sleeping on the outside, the lady was sleeping on the inside.

His head was toward the west wall of the bedroom. In other words, they would be facing us as we came into the bedroom.

Q. They would be facing you?

A. That's right.

Q. Was the headboard against the wall?

A. Well, I don't remember that. They were facing us as they lied in bed.

Q. One side was against the wall?

A. That's correct.

Q. Did you approach the foot of the bed or the right side of the bed?

A. The right side of the bed from the doorway.

Q. From the doorway you approached the lady's side of the bed?

A. No, no. The man's side of the bed.

[190] Q. I see.

Where was Officer Sullivan, alongside of you?

A. I wasn't watching Officer Sullivan.

Q. My question is: Do you know where Officer Sullivan was?

A. I do not, other than he was in that room with me.

Q. When you approached the bed did you shake the bed?

A. No, no. Those people were awakened either by us walking into the room, by the light or by my inadvertently kicking over these beer bottles.

Q. You were coming in pretty fast, were you not?

A. No.

Q. You were walking in leisurely, is that your testimony?

A. I would say cautiously.

Q. Cautiously. You said that you went hurriedly up the hall. When did you change your speed?

A. I said rather hurriedly up the hall. As we stepped

into the bedroom I myself, I would say, from normal police procedures, stepped in slowly.

[191] Q. You stepped in slowly with your hand on the flashlight?

A. With the flashlight in my hand.

Q. I take it you had your gun hand ready in case you needed it, right?

A. I had my gun in my pocket with my hand on it.

Q. Good.

You went up to the foot of the bed, is that right, or to the right side of the bed?

A. I went to the side of the bed to the best of my recollection.

Q. How close to the bed did you get?

A. I would say a matter of possibly—I didn't get to the bed when the people were aroused, to the best of my recollection. Either the light, the bottles or our walking into the bedroom—

Q. Did you finally get to the side of the bed, the right side?

A. I would say so, yes.

Q. So you were right next to the bed, correct?

A. Well, I was in the room in the vicinity of the bed.

[192] Q. So you could look down?

A. That's correct, sir.

Q. You looked down with your flashlight and with your hand on your gun, correct?

A. I don't recall whether my flashlight was on or not.

Q. At any rate, your hand was on your gun and you looked down at these people?

A. My gun was in my pocket, and I had my hand on it. I did not have a holster on, so that it was obvious to the occupants that I had my hand on a gun.

Q. It was?

A. It was not.

Q. It was not?

A. They may have assumed that I did, but—

Q. You had your hand in your right pocket, is that correct?

A. That's correct, sir.

Q. Was the safety on the gun?

A. The safety is always on a police gun.

Q. Was it at that moment, sir?

A. A safety is always on a police, an automatic safety.

[193] Q. I see. You could shoot it without releasing the safety, is that your testimony?

A. Yes.

Q. So your hand is in your pocket and you are right over them, is that it?

A. My hand in my pocket.

Q. You are right over them, and by that time they are aroused, is that right?

Mr. Kaveny: Objection, your Honor. He asked two questions there.

The Court: Objection sustained.

By Mr. Reuben: Q. You get to the right side of the bed with your hand in your pocket, correct?

Mr. Kaveny: I believe there are still two questions, your Honor. The witness has testified that he stepped into the room and the people were roused by the commotion or noise. We are getting two questions here, "You were standing by the side of the bed with your hand on your gun."

The Court: If he can answer, he may answer.

[194] By the Witness: A. I don't recall. I was in the bedroom. I had a flashlight in my one hand, the light was on, not the flashlight. It may have been the overhead light. I don't know whether the flashlight was on or not. I had my hand on my gun in my pants pocket.

By Mr. Reuben: Q. I want to find out how close you got to the Monroes' bed.

Mr. Kaveny: Objection, your Honor. May counsel then ask that question instead of going through this discourse about what he was doing and how he was doing it? He is asking the question how close he was to the bed, but he has gone into quite a discourse on how close and was he standing over them.

The Court: The objection is overruled. Proceed.

By Mr. Reuben: Q. Were you touching the bedclothes when you finally stopped your forward motion with your pants legs, say?

[195] Mr. Kaveny: Objection, your Honor.

The Court: Objection sustained. There are two questions.

Mr. Reuben: I am sorry, your Honor.

By Mr. Reuben: Q. When your forward motion was stopped, Captain, how close to the Monroes' bed were you?

A. Well, this was a small bedroom, and being in the room at all you would be rather close to the bed, which was the largest piece of furniture in the room.

Q. You could look down on them?

A. I was looking down on them.

Q. When you did say something, what were the first words that you said?

A. I said, "Are you James Monroe?" to the man, addressing the man.

Q. To the man.

Now, say that to me as you said it to Mr. Monroe the morning of October 29, 1958, in the tone and the loudness which you used.

A. I said, "Are you James Monroe?"

Q. In a conversational tone, is that correct?

[196] A. That is correct.

Mr. Kaveny: Objection, your Honor.

The Court: He has answered. Proceed.

[197] By Mr. Reuben: Q. What did Mr. Monroe say to you?

A. He said, "Yeah," or "Yes," or something. He replied in the affirmative. Whatever it was, I don't remember.

Q. Did he appear to have been roused from sleep? Was he wide awake at that moment, or what?

A. No; he appeared to have been drinking.

Q. Had he been asleep or was he aroused, or what?

A. I don't know whether he had been asleep or not, Mr. Reuben.

Q. In other words, your testimony is that he was fuzzy, is that correct?

Mr. Kaveny: Objection, your Honor.

The Court: If the witness can testify on the basis of that, he may answer.

By the Witness: A. I said the man appeared to be drinking, and that's all I can tell you about it.

By Mr. Reuben: Q. You cannot tell us whether he was fuzzy or alert, just that he appeared to have [198] been drinking, is that right?

Mr. Kaveny: Objection, your Honor.

The Court: Objection sustained. The witness has already answered.

By Mr. Reuben: Q. What did you then say to him?

A. I said, "We're police officers; we want to talk to you. Get out of bed."

Q. Did you say that just as you have said it at this moment?

A. Yes. I had no animosity toward this man.

Mr. Reuben: Your Honor, I move to strike that.

The Court: It may stand.

By Mr. Reuben: Q. Did you say, "Please get out of bed"—

A. No.

Q. —or "Get out of bed" or—

Mr. Kaveny: Objection, your Honor.

By the Witness: A. No.

The Court: Just one minute. Have you finished your question, Mr. Reuben?

[199] Mr. Reuben: Yes, sir.

The Court: You have already asked as to what tone of voice he said it in, and he has already answered. The objection is sustained.

By Mr. Reuben: Q. What did he do or say?

A. He got out of bed. He complied.

Q. Immediately?

A. Yes.

Q. What happened then, so far as you know?

A. He was taken into the living room by Officer Sullivan.

Q. Did you accompany him into the living room?

A. I don't recall whether I did or not. That's eleven years ago.

Q. You do not recall whether you stayed in the bedroom or went into the living room?

A. I know I was in and out?

Mr. Kaveny: Objection, your Honor. He is characterizing the gentlemen's testimony again.

[200] The Court: He may answer.

By the Witness: A. I was in and out of the bedroom possibly one, two or three times. I don't recall at this late date whether I took Monroe from the bedroom to the living room. I know that Sullivan did; I don't know whether I accompanied him or not.

By Mr. Reuben: Q. Let me refresh your recollection, Captain Pape. Do you remember testifying in open court yesterday?

A. Well, I testified.

Q. Do you remember yesterday saying as follows, and

I am reading, your Honor, from Page 106 of yesterday's transcript:

> "I said, 'We want to talk to you; get out of bed,' so he got up and I put him in custody of Officer Jerry Sullivan, who testified here, and we walked out to the living room of this apartment."

Then, on Page 107, Mr. Kaveny said:

> "Q. What did you do after Mr. Monroe was taken out of the room?"

Your answer was at that time, Captain Pape:

[201] "A. I went back into the bedroom and I began looking into a closet for the shirts that were described as having been taken in this robbery and murder."

Now, I ask you, sir, do you remember what you next did when Mr. Monroe was taken out of bed?

[202] Mr. Kaveny: I object, your Honor. This is improper impeachment. I presume counsel is attempting to impeach since he read the record from yesterday. The gentleman has testified a moment ago that he did not recall whether he did or did not escort Mr. Monroe into the front room with Sergeant Sullivan. The record from yesterday is no different than it is today. If he is going to impeach him he should then lay the proper foundation.

I do not believe this particular item is material for impeachment purposes.

The Court: It differs from his testimony at the present time. The objection is overruled. Proceed.

Mr. Reuben: Would you read the question, please.

Q. (Read by the reporter.)

By the Witness: A. To the best of my recollection, I don't recall whether I went with Jerry Sullivan and Mr. Monroe to the living room or whether I remained.

[203] By Mr. Reuben: Q. Would you have left Mrs. Monroe alone?

A. Well, Mrs. Monroe was left alone all the time she was in the apartment. I don't know why not.

Q. So that your answer is you would have left Mrs. Monroe alone?

A. She was left alone.

Mr. Kaveny: Objection, your Honor, to the characterization.

The Court: He has already answered.

Mr. Kaveny: I move to strike it.

The Court: It may stand.

By Mr. Reuben: Q. Was there a closet in the Monroe bedroom?

A. Yes, there was.

Q. Was there a search made of the closet before Mr. Monroe was taken into the living room?

A. I don't know. I searched the closet. Whether he was on his way, whether he was in there, I do not know.

Q. Officer, how did you know that somebody was not hidden in the closet, remembering that you were looking for two men at the time you arrested Mr. [204] Monroe?

A. I am sure if he was there I would have found him.

Q. However, as I understood your testimony yesterday, you and Officer Sullivan left Mrs. Monroe and went into the living room, leaving Mrs. Monroe in the bedroom unguarded?

A. I said I may have gone to the living room.

Q. What precaution did you take that Mrs. Monroe was not armed that day?

A. That's the hazards of the occupation. It happens every day.

Q. Did you take any precautions?

A. Insofar as what, sir?

Q. To insure that Mrs. Monroe did not have a weapon under her bedclothes?

A. No. She may have had, but she did not, apparently.

Q. Did you look under the bed before you took Mr. Monroe out of there?

A. No, I did not.

Q. Did anybody?

A. I couldn't say.

[205] Q. Did you look in the closet before you took Mr. Monroe out?

A. No, I don't think so, to the best of my recollection.

Q. Did you have any conversation with Mrs. Monroe at the time that you had your conversation with James Monroe?

A. At the time?

Q. Yes, at the moment when you were at the bedside with Mr. Monroe.

A. Not that I recall at this time.

Q. Did she say anything to you?

A. You mean at that moment?

Q. Yes, sir.

A. Not that I recall.

Q. Did you know that she was Mrs. Monroe at that moment?

A. I assumed she was.

Q. I would like you to answer, sir, whether you knew at that moment that that was Mrs. Monroe?

A. I assumed she was.

Mr. Kaveny: Objection, your Honor.

The Court: It may stand.

[206] By Mr. Reuben: Q. How long after Mr. Monroe was taken out of the bedroom did you begin to search the bedroom?

A. I would say very shortly.

Q. Where was Mrs. Monroe?

A. In the bed.

Q. She was in the bed. Did she have the bedclothes up to her neck or bedclothes to her waist, or where?

A. Well, she was wearing a black knitted—

Mr. Kaveny: Objection, your Honor.

Well, I will withdraw it.

The Court: All right.

By the Witness: A. As the woman was lying in bed, she was wearing a black knitted what appeared to be a sweater which you could see probably from the neckline up.

By Mr. Reuben: Q. You still had your hand on your flashlight or on your gun at that point?

A. I wouldn't know; I don't know.

Q. When you started to search the bedroom, did [207] you encounter any of the Monroe children?

A. No.

Q. Wasn't there a baby in the corner?

A. No. I think the baby might have been, to the best of my recollection, in the corner of the living room, not in the bedroom.

[208] Q. At what point did you see the baby?

A. Sometime during the course of the period we were in the home, to the best of my recollection.

Q. Monroe was taken to the living room?

A. Right.

Q. When Monroe was taken to the living room, was that when you saw the baby?

A. I don't recall when I saw the baby. It was sometime during the time we were in the apartment. It seems to me there was a young baby in a crib or basket of some sort.

Q. Who was in the bedroom with you and Mrs. Monroe when you searched?

A. Just her and myself.

Q. Did you have a conversation with Mrs. Monroe?

A. Yes, I did. She addressed a question to me.

Q. What was her tone? Was she frightened?

A. No, I don't believe she was frightened.

Q. Perfectly calm?

A. I would say she spoke to me in a normal tone.

Q. She did not seem concerned at all over what [209] had happened, is that correct?

Mr. Kaveny: Objection, your Honor.

The Court: If he was able to observe, he may answer.

By the Witness: A. Whether she was concerned or not, I don't know.

By Mr. Reuben: Q. You could not tell, is that your testimony?

Mr. Kaveny: Objection, your Honor.

The Court: Objection sustained. The witness has answered.

By Mr. Reuben: Q. Now, what did you search—strike that.

What was the conversation with you and Mrs. Monroe that day?

A. She asked me if I would step out of the room so she could get up, and I said to her that it wasn't necessary that she get out of bed and if she wished to do so that all she had to do was wrap the blankets which were covering her and get up.

Q. What was your tone to Mrs. Monroe? Were you soft-spoken and gentle with her or were you harsh?

Mr. Kaveny: Objection, your Honor. That is more [210] than one question.

Mr. Reuben: I am just asking for his tone.

The Court: Objection overruled. Proceed.

By the Witness: A. You are asking for her tone or my tone?

By Mr. Reuben: Q. Your tone.

A. Normal.

Q. Normal conversational tone?

A. That's correct.

Q. Where did you search first in the bedroom?

A. The closet was the only place I looked.

Q. You opened the door to the closet, sir?

A. No. I don't know whether it had a door on it. It was open. If it had a door on it, it was open, and I'm not certain it did have a door on it.

Q. Was it deep or shallow?

A. A rather shallow, normal clothes closet.

Q. What was in your hand at the moment?

A. A flashlight.

Q. You had the flashlight in your hand. Now, you go into the closet. Tell us just what you did.

[211] A. There were just a few articles of clothing in the closet. On the floor there were some soiled, what appeared to me to be underwear, possibly, men's underwear,—

Q. The clothes that were—

The Court: Let the witness finish answering.

Mr. Reuben: I am sorry, your Honor.

By the Witness: A. (Continuing) There were some T shirts and probably a couple of T shirts and maybe men's trunks and maybe a couple of sport shirts or shirts of one sort that a man would normally wear, and we were looking for a certain brand of shirts and I looked at the shirts. It wasn't of the brand that we were seeking, and I looked at the soiled linen on the floor, and that was the end of the search insofar as I was concerned.

[212] Q. Now let me ask you this: The clothing in the closet that was clean—there was some clean clothing?

A. There was some clothing hanging on hangers, yes. A couple of items. Several items.

Q. Did you take it off the hanger, or just how did you do it?

A. I don't remember that. I looked at the labels in the collar.

Q. Did you pick up the hanger and put the flashlight on it?

A. I don't remember that.

Q. You don't know what you did?

A. I looked at the clothing. I looked at the labels in the shirts. They were not of the kind we were seeking, and I just left them there.

Q. Then you put them neatly back?

A. I didn't say I took them off.

Mr. Kaveny: He has not testified he took them off the hooks.

Mr. Reuben: I am trying to find out what he did.

Mr. Kaveny: Then let him answer what he did.

The Court: There will be no comments.

[213] Address all remarks to the Court. I will rule on it. We will proceed.

By Mr. Reuben: Q. Did you take the clothing that was on the hanger off the hanger?

A. I don't recall.

Q. At any rate, if you did take them off, you would put them back, is that your testimony?

Mr. Kaveny: Objection, your Honor.

The Court: The objection is sustained.

By Mr. Reuben: Q. The soiled clothing, did you pick it up, or did you examine it with your foot, or how did you examine it, Officer Pape?

A. I would pick it up to look at the labels.

Q. You bent down and picked it up?

A. I am assuming that that is what I did. This is eleven years ago.

Q. So you can't recall, is that your testimony?

Mr. Kaveny: Objection.

By the Witness: A. I know I looked at the labels in whatever clothing was in there.

By Mr. Reuben: Q. Well, you do not recall [214] whether you bent down or what you did.

A. No. I don't recall whether I bent down. I know I looked at them. How I looked at them I don't know.

Q. Was your back to Mrs. Monroe at that time?

A. I don't even know if Mrs. Monroe was in the room at the time, because the next time I saw Mrs. Monroe was when I turned around, she was out in the hall.

Q. You don't know who was in the room with you, if anybody?

A. That's correct, sir.

Q. Could any of the children have come in the room while you were there?

A. May have. I don't know. They were all over the place.

Q. So at any rate, your back was exposed to any unfriendly person while you were searching the closet, is that correct, Officer Pape?

A. I don't know that there was any unfriendly person in the place.

Q. When you turned around after your search, was Mrs. Monroe still in bed?

[215] A. No.

Q. She was not?

A. No.

Q. Did you examine the bedding then?

A. No, I did not.

Q. Did you cause anybody to examine the bedding?

A. No.

Q. Did anybody examine the bedding in your presence?

A. The bedding was examined, I believe, by Officer Sullivan.

Q. In your presence?

A. I don't know whether it was in my presence or not, counsel.

Q. Did he do it before or after you examined the closet?

A. I couldn't tell you that.

[216] Q. Did you look under the bed?

A. No, I didn't look under the bed.

Q. What other furniture was in the room besides the bed?

A. I don't recall.

Q. Was there a dresser?

Mr. Kaveny: Objection, your Honor.

The Court: If he recalls now, he may answer.

By the Witness: A. I don't recall. Officer Sullivan testified there was. I don't recall.

By Mr. Reuben: Q. Did you search anything besides the closet in that room?

A. No, sir.

Q. So that in any event, if there was a dresser, you didn't search it?

A. That's correct, sir.

Q. After you finished the search of the Monroe bedroom, what did you do?

A. While I was in searching, checking this closet, Mr. Monroe was out in the living room talking very loudly, complaining of our presence in his home. I went out to him and said, "Now, Monroe—". What [217] he stated was that his neighbors would resent the commotion, or whatever, and I said, "Well, if you will lower the tone of your voice, why, your neighbors won't even know we have been here." He made some remark as to what he was being arrested for. I don't know if it was at that moment or not. I said in connection with the picture identification for armed robbery. Somewhere during ten minutes we were in the some I told Mr. Monroe that.

Q. Is it not a fact, Officer Pape, that Mr. Monroe made no commotion or any great objection concerning the arrest?

A. Mr. Monroe—

Mr. Reuben: I would like the question answered yes or no, your Honor.

The Court: Yes or no.

By the Witness: A. I don't know how I can answer that question yes or no, without explaining.

By Mr. Reuben: Q. You can't answer the question yes or no?

The Court: The witness has so stated.

[218] By Mr. Reueben: Q. Is it not the fact that Mr. Monroe raised no great objection concerning arrest of him?

A. Well, I would say he was not abusive.

Q. So that he did not raise any great objection concerning it?

A. I don't expect he was happy about it, but he was not abusive.

Q. The commotion in the apartment was caused solely by the children, was it not?

A. Well, the greatest majority of it was, and then only the loud speaking of Mr. Monroe, as I related, and I went out and spoke to him. We had no great problem with Mr. and Mrs. Monroe. It was the children.

Q. It was with the children, was it no?

A. That's correct.

Q. They were upset and frightened?

Mr. Kaveny: Objection.

The Court: He may answer, if he knows.

By the Witness: A. I wouldn't say they were frightened.

By Mr. Reuben: Q. I didn't hear the answer.

A. They weren't frightened.

[219] Q. I didn't hear your answer.

The Court: Read the answer.

A. (Read by the reporter.)

By Mr. Reuben: Q. Were they upset?

A. Well, they engaged in a lot of obscenities, so they certainly weren't frightened or they wouldn't have acted in that fashion.

Mr. Reuben: Your Honor, I move that be stricken.

The Court: It may stand. Proceed.

[220] By Mr. Reuben: Q. Were the children quite upset?

A. They were running about the premises shouting obscenities, yes.

Q. Were they quite upset, Officer Pape?

A. I would say so. I was describing their conduct.

Q. You then went back into the living room, and—

A. When are we talking about?

Q. We are now talking about after you searched the bedroom. You went back in the living room. You just testified about a conversation with Mr. Monroe. Did you then or at any time attempt to ascertain the number of persons who were in that apartment?

A. No.

Q. Did you ever attempt to ascertain to identity of any persons in that apartment, other than Mr. Monroe?

A. To the best of my recollection, I asked Mr. Monroe if these were all his children. To the best of my recollection. He said no, that some were his by a previous marriage and some were his wife's. Monroe was [221] a comparatively young man, and, as I say, some of these children were fourteen, sixteen years of age.

Q. You never did get a count or an inventory of the number of people that occupied that apartment. Can we leave it that way?

A. No. I didn't take inventory.

Q. Were any other rooms searched besides the Monroe bedroom?

A. I would presume so.

Q. Did you search any other rooms?

A. No, sir.

Q. Did you instruct anybody to search any other room?

A. These were experienced men, and they know how to proceed in these investigations. I wasn't there to instruct them as to how they were to proceed.

Q. So you gave no order to search any room. All that you know is that the bedroom was searched for the evidence in question?

A. The bedroom that I was in.

Q. That's correct.

A. And I am assuming the others were searched [222] as well.

Q. You are assuming. Did anybody after the arrest in the detail ever tell you that they had searched the Monroe apartment?

A. I asked the question as to whether any of the men found the shirts we were seeking, and the answer was no.

Q. Did you ask what rooms they had searched?

A. Oh, no. No.

Q. Did you inquire as to whether anybody looked for or found a weapon?

A. Well, I would normally ask that.

Q. Did you?

A. I would presume I did, and I certainly would expect an experienced police officer to report to me if he found a weapon in the apartment.

Q. So that when you left the apartment that morning, you were satisfied in your own mind that the entire apartment had been searched by you and your men, correct?

A. To a certain degree.

Q. Well, to what degree?

A. Well, because of the fact of the commotion [223] raised by these children and the obscenities and so on, I might say I was very happy to leave there.

Q. Even if you left some evidence behind?

A. Well, I would believe that we didn't leave any evidence behind, but I was very happy to get out of there.

Q. And you were satisfied that you had, you or your men, searched for anything that would have been relevant to the crime that you were investigating, is that right?

A. I would say yes.

Q. Now, did the men who were at the back or the front door even come in?

A. Yes. I believe that the man whom I left at the back door—of course, they followed me in shortly after Sullivan and I came in, and then Mrs. Monroe permitted one or two of the officers who were at the front to come in. She opened the door and let them in.

Q. I am just a little mixed up. You came in with Officer Sullivan, and then there were two other men that came in—

A. At the door with me when I knocked on the [224] door.

Q. I am talking about the two men that were left at the back door. Did they come in? Did you see them in the apartment?

A. I know that the one officer who testified here, Pat Conway, did not come in. He remained either in the gangway or the alley. Whether the others came in or not, I don't know.

Q. Now, it is your testimony that Mrs. Monroe went and opened the front door and invited these two officers in?

A. That is the testimony, yes.

[225] Q. Did you hear her talk to them?

A. No.

Q. Do you know how she invited them in?

A. No, I do not.

Q. Did you see her at the front door?

A. Well, it was testified here that she opened the door for them and let them in. I am assuming that the testimony is correct.

Q. You did not see Mrs. Monroe invite the men in?

A. No.

Q. Nor did you see how they got in, did you? Or did you?

A. Well, I know they were admitted by her.

Q. You know they were admitted, but you don't know how, is that correct?

A. That's correct.

Q. So at some point seven of the eight police officers were in the apartment, is that correct?

A. No, that is not correct.

Q. All right. I fell off the track somewhere. If there were eight in the detail, the two from the front came in— [226] A. I didn't say the two from the front came in. She permitted some officers at the front to come in. She went to the door. Whether they both came in or not, I don't know. One of them testified here that he came in. I assumed he did.

Q. All I would like to know, sir, is how many police officers of your detail did you see in the Monroe apartment that morning?

A. I don't know. I wasn't counting police officers.

Q. Well, did you see any of the front door detail men in the apartment?

A. Any of the what?

Q. The front door detail men in the Monroe apartment.

A. The only police officers I recall vividly seeing in the apartment was Jerry Sullivan, and I believe Lieutenant Jerry Sullivan, who testified here, and another officer. I think it may have been—I can't recall. The reason I remember them being in the apartment so well is when I want

up and spoke to Monroe, they were standing there with him.

[227] Q. Who gave the order to the police officers to leave the apartment?

A. I would.

Q. Well, what did you say?

A. I said, "We'll leave." In the meantime I told Mrs. Monroe—she said, "Where are you taking Mr. Monroe?" I said to the detective bureau.

Q. Do you remember who said, "We'll leave" to?

A. I just said it in the apartment, that we had completed our search, I believe, and whatever was necessary, and we left.

Q. Where were you standing when you gave the order, Captain Pape?

A. I don't remember that.

Q. Did you shout it to the rest of the apartment so all the officers in the back part would know it, or just how did you get the word to all of the officers in the apartment to leave with you?

A. Well, if I was in the living room and there were two or three officers there, and I said, "Let's leave," and we were taking Mr. Monroe out, and when he [228] asked to change his clothes, and I said that won't be necessary, certainly the other officers, whom we may have passed, if they were in the apartment, would naturally follow us out. I am assuming that this is what happened, because we all left there.

Q. Did you leave through the front door or the back door?

A. The back door.

Q. The same way you came?

A. That's right, sir.

Q. In the living room Mr. Monroe was in his shorts, I believe you testified, is that correct?

A. That was testified to here.

Q. Did you see him in his shorts?

A. When I saw Mr. Monroe he had a pair of dungarees on, with the plaster on them.

Q. Did you give him the pair of dungarees?

A. No, I did not.

Q. Do you know who did, of your own knowledge?

A. Yes. Sullivan gave them to him.

[229] Q. Where did he get them from?

A. I believe from the bedroom in which the man had been sleeping.

Q. Where in the bedroom?

A. He got them from the bedroom. I don't know where. They may have been—I don't know if there was a chair or dresser there. I wouldn't know where he got the pants from. He may have gotten them out of the closet. I don't know.

Q. So maybe Sullivan was in the closet as well as you, is that correct?

A. That's possible.

Q. You weren't in there at the same time, is that correct?

A. That's true.

Q. Now, is it your testimony that throughout this morning you never used any obscenities to the Monroes?

A. That is absolutely correct.

Q. And that you never said things about their race to them?

A. That is absolutely correct.

Q. Have you ever, in arresting suspects in your [230] 33 years on the police force ever used an obscene word to an accused?

Mr. Kaveny: Objection, your Honor, as not being material.

The Court: The objection is sustained.

Mr. Reuben: I would like to be heard.

The Court. It is what was said at the time. The objection is sustained.

By Mr. Reuben: Q. Have you ever used a harsh word —strike that.

Did you use any kind of a harsh word to the Monroes or any of their children that morning?

A. No. I bore no animosity toward the Monroes.

Q. You said nothing to them unkind? You made no curses or anything?

A. That's correct.

Q. Even though you were glad to get out of that apartment?

A. I was very happy to leave.

Mr. Kaveny: Your Honor, if I may be heard—

[231] The Court: He has answered. It may stand.

By Mr. Reuben: Q. At no time did you use any of the words Mr. Kaveny asked you about in that apartment or in connection with the Monroes? Is that your testimony?

A. Would you repeat the words?

Mr. Kaveny: Objection.

The Witness: Would you repeat what Mr. Kaveny questioned me on? That is the answer I gave.

By Mr. Reuben: Q. You don't recall the words Mr. Kaveny asked you whether or not you used in the Monroe apartment yesterday? Is that what you are saying?

Mr. Kaveny: Objection, your Honor.

The Court: The objection is overruled.

By the Witness: A. Would you tell me what the words were, and I will answer the question.

By Mr. Reuben: Q. You don't remember now? [232] Is that your testimony?

A. Well, Mr. Kaveny asked me many questions.

Q. Mr. Kaveny asked you about the use of some words,

some curse words, and some words of aspersion about Mr. Monroe's race.

A. Well, if you will repeat it, I will answer the question.

Q. You can't answer unless I repeat it, is that your testimony?

A. I think I know what you are referring to, but I want to be sure.

Q. Will you answer my question, sir?

Mr. Kaveny: Objection, your Honor.

The Court: The objection is sustained.

Mr. Reuben: That is all.

The Court: No further cross-examination?

Mr. Reuben: No, sir.

The Court: Any redirect?

Mr. Kaveny: I do have some redirect, your Honor.

The Court: How long will it take? I just want to know approximately.

[233] Mr. Kaveny: I would like to adjourn for lunch, if we may.

The Court: All right.

Will you take the jury to the jury room? We will recess until two o'clock.

Ladies and gentlemen of the jury, I also want to inform you that we have a Judges' meeting at three o'clock for the day, and if you desire to make any calls or otherwise in connection with it, I wanted you to know that fact. We will go from two to three o'clock this afternoon.

Thank you.

(There was a short interruption, after which the following further proceedings were had herein, in open court, out of the presence and hearing of the jury:)

The Court: Mr. Kaveny, just approximately how long do you think your redirect will take?

Mr. Kaveny: Five, ten minutes, your Honor.

[234] The Court: Then how many more witnesses do you have?

Mr. Kaveny: I propose to call Mr. Magnussen as a hostile witness. That is the end of my case.

The Court: You would estimate that to take how long, your interrogation of him?

Mr. Kaveny: A half-hour. In a half-hour or so we will be through, at the maximum. I would be definitely prepared to conclude this afternoon.

The Court: All right.

We will recess until two o'clock.

(Whereupon, at 12:25 o'clock p.m., and adjournment was taken in the above-entitled cause, to resume at 2:00 o'clock p.m. of the same day.)

[235] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—Docket No. 61 C 2202) * *

Before Hon. Edwin A. Robson,
Judge, and a jury.

Tuesday, January 14, 1969,

2:00 o'clock p.m.

Met pursuant to a recess.

PRESENT:

Mr. Kaveny,
appeared for Plaintiff;

Mr. Reuben,
appeared for Defendant.

(Whereupon the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

[236] The Clerk: 61 C 2202, Frank Pape against Time, Inc., case on trial.

The Court: Good afternoon, ladies and gentlemen of the jury.

Good afternoon, Counsel.

Are you ready to proceed?

Mr. Kaveny: Yes, we are, your Honor.

The Court: The witness may take the stand.

FRANK W. PAPE, called as a witness in his own behalf, having been previously duly sworn, resumed the stand, was examined and testified as follows:

Redirect Examination by Mr. Kaveny.

Q. Captain Pape, when did you first become a police officer?

A. March 25, 1933.

Q. What was your rank at the time you joined the force?

A. Patrolman.

Q. How long did you retain than rank?

A. For nine years, I believe.

Q. What was your first duty assignment after [237] you joined the force?

A. I was assigned to the State's Attorney's office shortly after I became a policeman.

Q. How long were you assigned to the State's Attorney's office?

A. Four years as a detective.

Q. What was the general nature of your business while you were assigned to the State's Attorney's office?

A. Investigation.

Mr. Reuben: Your Honor, I might simply call to the Court's attention that I do not think this is redirect. I think it was originally covered and much of it is stipulated to.

The Court: How is this redirect, Mr. Kaveny?

Mr. Kaveny: Your Honor, I believe that during cross-examination he questioned the integrity of the witness, delving into his method of arrest when he arrested this particular person. We are now attempting to show or establish his integrity as a police officer through [238]

his occupation, his many years on this force, and the many citations and what have you that he has attained.

The Court: We have a stipulation of facts here.

Mr. Kaveny: I understand that.

[239] The Court: All of the matters that have been gone into at the present time in the interrogation are treated in it.

Mr. Kaveny: Part of it is and part of it is not, your Honor.

The Court: Just touch on the part that is not included. The jury has had read to them the stipulation of facts. There may be an area here, and I would allow the examination, but a brief examination. There are several pages in here which covers background.

Mr. Kaveny: All right, sir. I am attempting to lay a groundwork.

By Mr. Kaveny: Q. During the period from 1940 to 1950 what was your assignment?

A. I was a leader of a squad out of the Detective Division.

Q. What was your rank?

A. I was a sergeant of police.

Q. Do you know approximately how many arrests you effected during that ten-year period?

Mr. Reuben: Again, your Honor—

Mr. Kaveny: It is not in the stipulation, your [240] Honor.

The Court: I understand.

Mr. Reuben: If your Honor will recall, we limited ourselves to this arrest on cross-examination.

Mr. Kaveny: I suggest, your Honor,—

Mr. Reuben: Let me finish, Mr. Kaveny.

The Court: Let Mr. Reuben complete his statement, Mr. Kaveny.

Mr. Reuben: I do not think it is proper that we discuss

all of the arrests that may have been made during this officer's career. I do not see the relevancy of it.

The Court: There was the inference within the cross-examination that this might not have been proper police work that was done here. From what Mr. Kaveny has shown, that is the reason for it. I will allow him to answer.

Mr. Reuben: Thank you, Judge.

By Mr. Kaveny: Q. During the period, sir, from 1940 to 1950, are you aware of how many arrests you participated in that resulted in convictions?

A. Yes, I am.

[241] Mr. Reuben: Now, your Honor—

The Court: The objection is sustained to the question that was posed.

Mr. Kaveny: I will withdraw it.

The Court: As to the arrests that he made, all well and good, but not as to convictions.

Mr. Kaveny: I will withdraw it and rephrase the question, your Honor.

The Court: All right.

By Mr. Kaveny: Q. During the period from 1940 to 1950 as a sergeant of police, do you have an idea of how many arrests you participated in?

A. I would say it would number in the hundreds.

[242] Q. During that period of time did you receive any citations or creditable mentions?

Mr. Reuben: Your Honor, I would like to be heard.

The Court: The objection is sustained.

By Mr. Kaveny: Q. During the period from 1950 to 1960 did you participate in any arrests?

A. Many.

Mr. Kaveny: Your Honor, I would ask the same question.

The Court: Which?

Mr. Kaveny: The one I asked a moment ago.

The Court: As to the citations?

Mr. Kaveny: That's correct.

The Court: The objection will be sustained.

By Mr. Kaveny: Q. You left the Police Department in 1961?

A. In I believe April of 1961. I returned again in 1965 to my present assignment.

Mr. Kaveny: Thank you, sir. No further ques- [243] tions.

The Court: Any recross?

Mr. Reuben: None, your Honor.

The Court: All right. Thank you. You are excussed, sir.

(Witness excused.)

The Court: The plaintiff may call its next witness.

Mr. Kaveny: Your Honor, we will call at this time Mr. Magnuson of TIME Magazine as a hostile witness, an agent of the defendant.

Mr. Reuben: Adverse.

The Court: Adverse.

Mr. Kaveny: Adverse. I stand corrected, your Honor. Forgive me.

The Court: The witness will take the stand.

(The witness was thereupon duly sworn.)

[244] EDWARD F. MAGNUSON called as a witness on behalf of the Plaintiff herein as an adverse witness, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaveny.

Q. Would you state your name and address, please.

A. Edward F. Magnuson. I live in Westchester County, New York.

Q. What is your present occupation?

A. I am an associate editor of TIME Magazine.

Mr. Reuben: Excuse me, Mr. Magnuson, but I am having trouble hearing you.

The Court: Will you speak up, sir, so that all members of the jury can hear and so that all those seated at the counsel table may hear you. I might say that that is not an amplifier. It is merely for tape-recording of the testimony for the court reporter to check back on.

Mr. Reuben: Ed, you have to count on your voice.

[245] By Mr. Kaveny: Q. In November, 1961, were you employed by TIME Magazine?

A. Yes, I was.

[246] Q. What was your occupation, or, I should say, what was the employment you had with TIME at that time?

A. I was a writer in the National Affairs section of TIME.

Mr. Kaveny: Sorry, your Honor, but I lost the sequence of exhibits.

Your Honor, I have here what has been marked Defendant's Exhibit—well, I have what is to be marked or, there is a text of this article that is marked Defendant's Exhibit F for identification.

The Court: Wasn't that stipulated to?

Mr. Kaveny: Yes, sir.

The Court: Then it is in evidence, and whatever number we have given it, you can refer to that.

Mr. Kaveny: Thank you, sir.

By Mr. Kaveny: Q. Mr. Magnuson, I show you what has been marked Defendant's Exhibit F, being a copy of TIME magazine dated November 24, 1961. I call your attention to Pages 15 and 16, to an article appearing on those two pages, entitled "Civil Rights, Dawdling on the Corner."

[247] Would you examine that for a moment, sir?

Was that article written by you?

A. Yes, sir, it was.

Q. At the time you wrote that article did you make reference to any documents in the preparation thereof?

A. I had three documents at that time.

Q. Are you aware of what they are, sir?

A. Yes. They were a report by the U. S. Civil Rights Commission called "Justice"; a release from that Commission; and the New York Times stories on this topic.

Mr. Reuben: I am still having trouble, Mr. Magnuson.

The Court: Can the last juror hear the witness? You can? All right.

By Mr. Kaveny: Q. I show you sir, what has been marked Defendant's Exhibit G for identification, being entitled "United States Commission on Civil Rights", dated November 17, 1961, "For Friday A.M. Papers Release".

Is that the press release you make reference to?

[248] The Court: Isn't that stipulated to now, counsel?

Mr. Kaveny: Yes, sir. It is in evidence.

The Court: Defendant's Exhibit G, not for identification.

By the Witness: A. This also included the New York Times story.

[249] By Mr. Kaveny: Q. I am sorry, sir. There is attached to Exhibit G Defendant's Exhibit H also?

A. That's right.

Q. Lastly, sir, I show you Defendant's Exhibit E, entitled "Justice," and I call your attention to Pages 20 and 21. I ask you if those pages are the pages or if that book is the book to which you made reference.

A. This book is the book that I had.

Q. Now, sir, calling your attention to the magazine article, the one on Page 16, the opening paragraph in the left-hand column commences:

"Shifting to the north—"

Do you have that part?

A. I do.

Q. Can you tell me, sir, in those three documents what reference source you used for that particular paragraph?

A. For that paragraph, the book called "Justice."

Q. Pages 20 and 21?

A. It came out of Chapter 2 of this book, and [250] includes more than just Pages 20 and 21.

Q. What in the volume "Justice", other than Pages 20 and 21, was a source material for that particular paragraph?

The Court: Mr. Kaveny, I am reluctant to interrupt you, but we are referring to a paragraph, and I think it would be better, so that the jury understands, to have the witness read the paragraph. The jury will then have knowledge of that and then you can make reference to the source material.

Unless there is an objection by Mr. Reuben—

Mr. Reuben: No, your Honor. This is Mr. Kaveny's examination, and I will try not to intrude.

The Court: Just to clarify it for the jury.

Mr. Kaveny: Thank you, sir.

By Mr. Kaveny: Q. Would you, Mr. Magnuson, read the first paragraph in the left-hand column on Page 16 of the magazine?

[251] A. (Reading:)

> "Shifting to the north, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by thirteen police officers, ostensibly investigating a murder. The police, says 'Justice'—
>
> —and then the following is in quotes:
>
> " 'broke through two doors, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank

Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy". Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing [252] clothing from the closets to the floor, dumping drawers and ripping mattress covers.'

"The officers were not punished, although Monroe has carried a suit to the Supreme Court and is still seeking a civil judgment."

[253] Q. Mr. Magnuson, would you now read to the jury the material on Pages 20 and 21 of the government publication, commencing with the words "Search, Seizure and Violence, Chicago, 1958."

A. Read that entire section?

Q. If you would sir.

A. "The Supreme Court of the United States decided the case of Monroe vs. Pape on February 20, 1961."

The Court: I am sorry. Excuse me. Can the last juror hear the witness? Can everybody hear him? All right. Can you hear, Mr. Reuben? Can the plaintiff hear?

The Plaintiff: I can't hear him, your Honor.

The Court: Speak up, please.

By the Witness: A. "Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the federal Civil Rights Act on the basis of a complaint which alleged that—" —then there is a colon:

"On October 29, 1958, at 5:45 A.M. thirteen Chicago police officers, led by Deputy Chief of Detectives [254] Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the room; that the officers

roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on open charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate; although numerous magistrate courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family [255] or an attorney; that he was subsequently released without criminal charges having been filed against him."

[256] Q. Would you describe, sir, what deletions you made between the matter that you read in the government publication and the matter which you read in the TIME article?

Mr. Reuben: Your Honor, they are both before the jury. If you Honor thinks it is helpful, I will withdraw the objection, but they are both here for the eye to see. He who runs may reap—

The Court: Do you have any comment, Mr. Kaveny?

Mr. Kaveny: Simply, your Honor, that I would like the witness to answer.

The Court: All right. He may answer for the benefit of the jury.

By the Witness: A. Well, we have deleted only in the quotable parts here, the section of that paragraph which is within quotes. The only changes in that section

have been to change the word "that" in the "Justice" document to "the" in order to break up this long, long sentence. We have changed the semicolon to periods, again in the interests of clarity. Then we did not [257] continued the whole quote, which goes on to what happened after Monroe was arrested and brought to the police station.

By Mr. Kaveny: Q. You also, sir, omitted that part of the article that is in "Justice" which reads, "On the basis of a complaint which alleged that . . ."

A. That's right.

Q. In preparing this particular paragraph did you find reference in the press release, which you have in front of you, which exhibit number escapes me—

The Court: It is Exhibit G, is it not?

Mr. Kaveny: Yes, sir.

By Mr. Kaveny: Q. Did you find reference in Exhibit G, the press release of the United States Commission on Civil Rights, to the activities of Captain Pape?

A. I did not, sir.

Q. Did you, sir, find the New York Times article, which is Defendant's Exhibit H, a reference to the [258] activities of Captain Pape?

A. No, I did not.

Q. Did you, sir, in the Justice magazine find reference to the activities of Captain Pape?

Mr. Reuben: I simply object to the reference "Justice Magazine". "Justice" is a report.

The Court: The report and the exhibit number.

Mr. Reuben: It is Exhibit E, Mr. Kaveny.

Mr. Kaveny: Thank you, sir.

By Mr. Kaveny: Q. In Defendant's Exhibit E, did you find reference to the activities of Captain Pape anywhere besides Pages 20 and 21?

A. No, sir.

Q. Did you, sir, make any further investigation of any nature prior to preparing this article concerning what you have just read?

A. I asked the researcher to find out from the Chicago Bureau whether Detective Pape had been punished [259] in any way since this Monroe incident. I also asked her for his first name because it was not included in the report. Then I asked her for the location of the apartment, of the Monroes', roughly in the City of Chicago.

Q. Anything further, sir?

A. Those were the things that I needed from the researcher and that I had when I wrote the story, besides the documents cited here.

[260] Q. That is the complete investigation you made in the preparation by you of this article?

A. That's right.

Q. You conclude that particular paragraph by stating, "The officers were not punished." Was that based upon information given to you by the researcher in response to your question?

A. That's right. A telegram came back from the Chicago Bureau.

Mr. Kaveny: That is good enough, sir. I have no further questions.

The Court: Is there any examination of this witness on behalf of the defendant within the scope of the adverse examination made by the plaintiff?

Mr. Reuben: May I consult my notes for one second, your Honor?

The Court: All right.

(There was a short interruption, after which the following further proceedings were had in open court in the presence and hearing of the jury, to-wit:)

Mr. Reuben: No, your Honor.

[261] The Court: All right. Thank you, sir. You are excused.

(Witness excused.)

The Court: The plaintiff may call its next witness.

Mr. Kaveny: At this point the plaintiff rests, your Honor.

The Court: Are there any motions that you desire to make?

Mr. Reuben: There are at this time.

The Court: Ladies and gentlemen of the jury, there are motions that the Court will have to hear. I know it is before three o'clock, but I know you will not object. I will excuse you until ten o'clock tomorrow morning.

Thank you and good night.

(There was a short interruption, after which the following further proceedings were had outside the presence and hearing of the jury, to-wit:)

The Court: Are you ready to proceed, Mr. Reuben?

Mr. Reuben: I am, your Honor.

My motion, which I have written, is for a directed verdict. The plaintiff has the manifest burden under [262] the cases of showing that the material was false, showing that the defendant either knew it was false or published with a high degree of awareness of its falsity. I hesitated before I responded to your Honor because I wanted to make sure that in the stipulation, which is before your Honor, it was clear, as it is, that this article was researched. Mr. Magnuson wrote it, but as the stipulation shows, it went through the normal TIME research routine.

Now, I do not think they have come within gunshot of sustaining their burden. Their burden is to show that the article is false. I am not sure they did that. I would argue

that they have not from what I have observed of the Captain and his band, but passing that, the only person from TIME magazine they have called is Mr. Magnuson, and gave him a cryptic examination. It is very clear that Mr. Magnuson wrote from Justice, quoted from Justice, believing that it was true. There is not even a question by the plaintiff if he did or did not believe it was true.

Furthermore, it is very clear that the researcher had before her documents that confirmed what had occured. [263] The St. Amant case, for instance, makes it very clear that the plaintiff in a case like this sustains its burden when he shows that it was made up from the imagination of some such thing as that. In the instant case we have an official government document with headlines beginning, "Unlawful Police Violence". That is the way the chapter begins. It indicates that the Commission's study was such that it had field trips and everything and only put in cases where, in the opinion of the Commission, there was a substantial reason for putting them in. There were recommendations to the President of the United States.

[264] Certainly, no one can say, looking, at that, that Mr. Magnuson was not entitled to believe that, as being something more than just Mr. Monroe's allegations. When you couple that to the research file—after all, we are not looking alone at Mr. Magnuson. We are dealing with an utterance by Time, Incorporated. We are looking at what Mr. Magnuson's researcher did, and when you put the two together, it seems to me that no reasonable person as a matter of law can say that the plaintiff has satisfied the burden that the Court is so familiar with.

Now, I recognize, and I want to be candid with the Court, that there are occasions when a Court says to itself, never says it to the parties, "Well, I will reserve my ruling. Let's see what the jury does."

I urge the Court that this First Amendment field is not such a field, and I cite to your Honor Judge Tuttle's decision, the TIME Magazine decision of last week. If and I believe the record is crystal clear, that as a matter of law, Mr. Magnuson and Miss Berger, of TIME Magazine, is not guilty of actual malice as it is [265] constitutionally defined, then if you Honor does not direct the verdict and your Honor sends it to the jury, even if the jury comes back with a not guilty verdict, that is the chilling effect that Judge Tuttle was talking about. That is the kind of thing that prompts self censorship because I would be again less than candid if I told you that no publisher wants to go to a jury, if it can avoid so, no large publisher.

Furthermore, I concede and I proclaim that Time, Incorporated can stand the gaff of the expense, but many publishers cannot. I think that is what prompted the kind of philosophy that you see in all the cases we have cited to you and the kind of utterance by Judge Tuttle about the chilling effect of continuing litigation when litigation should be put to an end.

Mr. Pape has had his full opportunity to show actual malice, as defined by the cases that have come down last year, the Beckley case which your Honor has, where the proof was, it seems to me, much stronger, and [266] was quoted in the transcript of the Supreme Court Opinion.

For your Honor to say that as a matter of law this kind of evidence is not, if you will, directed verdict material, I would suggest that it has a chilling effect. I think they have come so woefully short of meeting their burden that if you Honor ordered us to continue, I think that it would not be with the spirit of St. Amant, the New York Times, and the Judge Tuttle case of last week, and I do not know whether it is McLaney or McKelney. I cannot get Scotch names right.

Thank you.

The Court: Mr. Kaveny.

Mr. Kaveny: Judge, we have briefed this point backwards and forwards as to what exactly is supposed and not supposed to be our burden of proof here. I can concede that you cannot prove actual malice and we have to prove that the publisher, reading from the St. Amant opinion, must have, and I presume that is all of its agents, had some doubt about what he was doing, and further on in the same Amant opinion, it says, "Likewise recklessness may be found where [267] there is obvious reason to doubt the veracity of the information or the accuracy of its reports, nor will they be likely to prevail when the publisher's allegations are so inherently improbably that only a reckless man would put them in circulation."

[268] We have here an article which says that the police officers pushed children to the ground and assaulted them, no better word for it, and mistreated them and grossly mistreated an adult man and woman in their own house. We have the writer of that story who candidly admitted that he deliberately refabricated, if you will, the story out of the Justice report. The Justice report itself meticulously quotes the dissenting opinion of Judge Frankfurter in the U. S. Supreme Court opinion. It does not go out and add editorial comment to it, and it meticulously puts out that is on a complaint which alleges that, and he testified that he cavalierishly changed all of this and took what were allegations and made them into facts.

The Court of Appeals in this matter at a prior time said that this article was substantially changed, said it was for a jury to decide whether or not they went too far. I think that part of this particular rule still applies.

The Court: The Court did not have before it then the decisions that had been handed down since that time.

[269] Mr. Kaveny: Sir, I refer you to that particular part, that they went too far in altering. I am here beset

with did we sustain our burden. I suggest to you that it is for the jury to decide. Were they acting within the scope here of the St. Amant decision. I think it is for the jury to decide if he did, in fact, entertain these doubts. He certainly altered the article. It is for the jury to determine whether or not that alteration is based upon these doubts or not. It is impossible to ask the witness that kind of a question.

The Court: Thank you. Do you have any response, Mr. Reuben?

Mr. Reuben: I would simply like to point out that alterations are not coequal to actual malice. The question is defined by St. Amant. The question, is in this record before your court, can any reasonable person argue to a jury that the defendant either knew that the material was false or recklessly published it without any regard for the truth or falsity. Of course, the Court has the stipulation that the TIME magazine file has Justice [270] with all that that connotes and has the truncated examination of Mr. Magnuson made by Mr. Kaveny, and I think that he is so constitutionally short of his burden that it does not come within gunshot of sustaining it.

The Court: Thank you, Mr. Reuben.

The Court will take this matter under advisement and will announce its decision at ten o'clock tomorrow morning.

Thank you. We will recess until ten o'clock tomorrow morning.

[272] The Clerk: 61 C 2202, Frank Pape against Time, Incorporated, case on trial.

The Court: Good morning, Counsel.

Mr. Reuben: Good morning, your Honor.

Mr. Kaveny: Good morning, your Honor.

Mr. Reuben: Your Honor, we are discussing the admissibility of—

The Court: The Court will make its ruling, first Counsel

for the defendant yesterday moved for a directed verdict of acquittal.

The Court has carefully considered that and has considered the record as made in this case and the stipulation as filed. At this stage of the proceedings, the Court has to view the testimony in the light most favorable to the plaintiff.

In view of the two decisions we have had from the Court of Appeals of this Circuit, the Court must, of course, proceed, as it does in all cases, with an abundance of caution, and after looking at the language of those two decisions, even in view of the later decisions that we have had, the Court is of the opinion that at this time the motion for a directed verdict of acquittal [273] must be denied. That will be the order of the Court.

Now, Mr. Reuben, we have the question to take up here as to the relevancy of the deposition of Richard Wolf, which you desire to read into the record.

Mr. Reuben: Parts of it.

The Court: Yes; the parts you have indicated.

[274] Mr. Reuben: I start with the fact, Judge, that the stipulation which the Court has ruled relevant and has read to the jury indicates that there was a Mr. Wolf and that Mr. Wolf, according to the stipulation, made field trips for the purpose of investigating police brutality in a number of cities in the United States, and that Mr. Wolf spent five or six full working days in Chicago in February of 1961. Before coming to Chicago Mr. Wolf had never heard of Frank Pape or the case of Monroe vs. Pape. That is the stipulation of the parties, and it is now in evidence.

Additionally, the book Justice, or I should say, the Civil Rights Commission report Justice, which is also in evidence as a defendant's exhibit, states in the chapter concerning Mr. Pape, and I read:

"In the text of this chapter, the Commission briefly

describes the alleged facts in eleven typical cases of brutality. They are presented in the belief that they contribute to an understanding of the problem. The allegations of misconduct are supported in several [275] cases by criminal convictions or findings by impartial agencies; in others by sworn testimony, affidavits from eyewitnesses or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appear substantial enough to justify discussion in this study."

Now, the plaintiff's position before the Court and before the jury and his posture in the Court of Appeals seemed to be that Justice was just simply reporting a complaint and therefore TIME magazine had the duty to pick up, when it picked up the complaint, and to note that it was alleged, that all this was no different from a news report, a stock news report of the filing of a lawsuit, or a decision of the U. S. Supreme Court based upon an allegation that was unproven.

[276] I think it is relevant to show that TIME had every reason to believe, when it was in Justice, that it was true. It may not have been the finding of a court, but it certainly was something different than just a sworn complaint, or a complaint.

It had the imprimatur not only of an examination by these famous commissioners, but it had a field staff investigation.

I think the jury ought to be told just what the Civil Rights Commission—in general terms that they did come to Chicago and that they did investigate this thing, and specifically the Pape case, and regarded it as a significant civil rights incident before they put it in Justice, because

otherwise I do not think I am going to be in as good a position as I would otherwise to refute the argument, "Well, it was in Justice", and they were just making it a complaint there, and that we should have done the same thing. That is not so.

This is the thrust of why we took Mr. Wolf's deposition and why the stipulation occurred. I am not anxious [277] to go into a lot of his hearsay testimony, I will shorten the thing up considerably, but I do want the jury to know that Mr. Wolf came here, that he talked to people about the Pape case, that he regarded it as a significant civil rights incident and recommended its inclusion in the report after its investigation, so that this document is not treated as a spot news report of a complaint.

The Court: Well, let me ask Mr. Kaveny a question.

Mr. Kaveny: Yes.

The Court: Would you stipulate that Mr. Wolf came to Chicago, the substance of this, that he came to Chicago, he conducted interviews, he went and talked with this one and that one and went out to the South Side?

In that we have Justice in here, I can see the possible relevancy of this testimony now, and rather than taking a lot of time here in excerpting what is essential and what is not essential, I should think by a short stipulation that could be read in, the facts could be established that Mr. Wolf did come to Chicago, he interviewed [278] attorneys, he interviewed individuals and he interviewed others for the purpose of making a report to the Commission on the facts as they existed in Chicago.

[279] Mr. Kaveny: Your Honor, when Mr. Wolf's deposition came up in the pretrial conference, it was before Judge Will. At that time I accepted much on Karen Booth in an effort not to prolong the agony, if you will, over stuff which was most obvious.

I refused to accept Mr. Wolf, and I stated to Judge Will at the time that I just didn't believe him.

I must take the same position right now. The stipulation that we did go into, that Mr. Wolf was a member of the Commission and did come to Chicago on behalf of Commission business and did do some investigation was because I felt it was an issue in the case.

The opening paragraphs of this particular article read, and the Court of Appeals in argument before it and also in its briefs considered this:

> "Justice carries a chilling test of police brutality both in the South and North and it stands as a great indictment, since its facts were carefully investigated by field agents."

Now, I felt that that part of the article was obviously [280] a reference to the opening lines of Chapter 2 of the volume and the issue was, did anyone investigate Chicago, and Mr. Wolf testified that he had journeyed to Chicago on behalf of the Commission and had done some investigation and reporting, so I felt that it would be—the word that comes to mind is "useless", but that is not the right word at all—that in the interest of our lawsuit, this was a thing I should stipulate to.

The Court: Yes.

[281] Mr. Kaveny: However, as far as the materiality of what Mr. Wolf did, you have read his deposition. As far as the hearsay, there is not a word that is not. Mr. Wolf cannot tell us that he saw the Monroes. All he can tell us is that he had a conference with Donald Page Moore.

The Court: I have a copy of the Donald Page Moore deposition. We have all of them.

Mr. Kaveny: Yes. All kinds of things were gone into in the rest of it, and that he submitted the briefs furnished him by Mr. Page Moore in the report, that he had no direct connection with the balance of Chapter 2. It was their deposition, not mine. They did not bring out that he wrote

any part of it. In fact, he said he did not; he only did some editorial writing on it.

It is obvious, your Honor, that the pickup of this on Captain Pape was not generated in any fashion by what Mr. Wolf did, and a reading of this makes it evident.

The Court: I will disagree with you from the reading of this. I am taking it in the context that Mr. [282] Reuben is presenting it here. I admit that much of this that we have in here is hearsay. If there is a stipulation that Wolf came to Chicago and interviewed people and that he reported back to the Commission and said who he interviewed, I do not see how that would affect it. He interviewed various parties in connection with material that went into this pertaining to the Pape incident.

Mr. Kaveny: Judge, I have no desire to prolong this at all, but I just do not feel that I can stipulate.

The Court: That he interviewed people with reference to the Monore case and the Pape incident is all that I see that it amounts to.

Mr. Kaveny: I am not even prepared to say that he—

The Court: He interviewed Moore, who brought the suit.

Mr. Kaveny: I will say that he interviewed Moore. I am even prepared to admit that, but I will go along with the stipulation that he interviewed Moore. What does the Court suggest?

[283] The Court: That he came here, conducted an investigation and interviewed various people, including the attorney for Monroe, Mr. Donald Page Moore.

Mr. Kaveny: That he did not interview anyone in behalf of Captain Pape or the police officers.

Mr. Reuben: That is not true. He interviewed Orlando Wilson, your Honor.

Mr. Kaveny: He testified in that that the only thing he found out from Orlando Wilson was that Captain Pape was

not currently on the police force. He went no further. I think I am entitled to that, your Honor.

[284] The Court: If that is all that it is, that is already in the record, that he did interview Orlando Wilson who told him he was not on the police force. What else is there in it?

Mr. Kaveny: He went no further in verifying the story.

The Court: Yes. What else is there in there, Mr. Reuben?

Mr. Reuben: Does your Honor have the deposition before you?

The Court: Yes, I have the deposition right here.

Mr. Reuben: He indicates that he interviewed some people out on the South Side and what have you, and then at Page 60 on redirect, Mr. Gunnels says:

> "Of the several cases or episodes of police brutality that you investigated and reported, only one of those is contained in Justice. Can you tell us how the decision was made and who made the decision to select the one case of Monroe vs. Pape?

He said that he didn't make the selection; that somebody else made the selection. He said:

[285] "A. I thought it was the best-developed case to show a striking instance of police misconduct in a large northern city."

This is the field of investigation.

Mr. Kaveny: I definitely object to—

The Court: Let Mr. Reuben finish.

Mr. Reuben: Let me finish my statement, counsel.

This, it seems to me, is the crux of what I am trying to get to the jury, that this is not simply the blind reporting of a complaint by Justice. They have put Justice on trial as well as TIME magazine here, and I am entitled to show just what they did.

The Court: In my going through this, just considering read parts of it, Moore was interviewed. Wilson was interviewed, but he gave nothing that I can see any relevancy to. Considering all of them, he interviewed Moore, who was the attorney, and you will have the pleadings and all matters in Monroe vs. Pape introduced into evidence. Here is Moore who was interviewed, and all he said was they had an elaborate discussion.

Mr. Reuben: He said on page 55 that he talked [286] to 50 people in Chicago.

Mr. Kaveny: The 50 people have no connection with this case, your Honor. Your Honor, there is something pernicious in this also.

The Court: I am not going into anything pernicious.

Mr. Kaveny: All right. We did not put Justice on trial, as Mr. Reuben would suggest to you. We have not begun to put Justice on trial, but we now have an investigator who was here, so we are now in the posture of having to say to the jury, "But notice that this investigator did not check in with anyone who could have told him the other side of the story."

The Court: I am aware of that.

Mr. Kaveny: We have never gone near Justice on this; we have gone only to TIME. I am sure Mr. Reuben would like us to put Justice on trial, too. All we have said about this is that there was an article in Justice about an important man and there was a deliberate refabrication of that story by TIME. We have said nothing about Justice here, and we demonstrated to the jury that had anybody investigated in the least bit on this, they would have found that the story was preposterous

[287] The Court: That is your conclusion.

Mr. Kaveny: True, true.

The Court: I just cannot see the relevancy of 90 percent of what you are asking for, Mr. Reuben, and my sugges-

tion would be to have a stipulation here rather than going through and ruling on it, that is, a stipulation that Richard Wolf came to Chicago, whatever the date or dates were. I do not know whether he made one or two trips here. I think it was only one.

Mr. Kaveny: It is one trip of five days, which is already stipulated to, your Honor, as an employee of the Commission for the purposes of investigation.

The Court: He came as an employee, that he interviewed Mr. Donald Page Moore, the attorney for the Monroes, had discussions with him as to the facts alleged in the complaint. Now, that complaint will be in evidence here. Also, that he did interview Orlando Wilson, the Commissioner of Police.

Mr. Reuben: I can shorten this up, your Honor.

The Court: All right.

[288] Mr. Reuben: I will tell you what I would be happy to do. I will stipulate that we tell the jury as part of our case that when Mr. Wolf was here, the same Mr. Wolf that was in the stipulation read by the Court during the four or five days he inquired into the facts surrounding Monroe versus Pape, and then reported back to the Civil Rights Commission in Washington, period, end of stipulation. That is one line.

The Court: Is that agreeable?

Mr. Kaveny: No, sir.

Mr. Reuben: Well, you can't win them all.

Mr. Kaveny: I am willing to accept the Court's stipulation, because—

The Court: I have not even concluded mine yet, and that was a part of it, that he reported back of his interview on Monroe versus Pape.

Mr. Kaveny: I will accept yours. My problem with Mr. Reuben's is that this opens this grandiose field that he did this tremendous investigation, but now we are not

going to talk about it. I am only too happy to say that he interviewed Donald Page Moore [289] concerning the facts alleged in the complaint, that he talked with O. W. Wilson, but I want it brought out that all O. W. Wilson told him was that Pape was not on the police force at that time. I do not want it brought out that he compared two sides of a story.

The Court: Let's not give up here. We are down to what?

Mr. Kaveny: And he filed his report with the Commission.

Mr. Reuben: He did not only talk to O. W. Wilson.

The Court: Also, that he conducted other interviews, that is all that I was going to do.

Mr. Kaveny: Not concerning—

The Court: There were some of them that were concerning this. In my reading of this deposition it says that he conducted other interviews and made his report.

Mr. Kaveny: Other interviews then suggested that he discussed it with the Monroes, and he cannot—

The Court: You can put in, "but did not discuss it with the Monroes."

[290] Mr. Kaveny: All right.

The Court: Mr. Reuben, state on what you are willing to make a short statement.

Mr. Reuben: That the gentleman, Mr. Wolf, employed by the Civil Rights Commission, who came to Chicago for an inquiry concerning police brutality, while in Chicago interviewed people concerning the Monroe versus Pape incident.

[291] The Court: Among other things the Monroe vs. Pape incident. It was not just that.

Mr. Reuben: All right. He then returned to Washington and reported his findings to the Civil Rights Commission before the Justice report was written or issued, so that

it was not after, I mean. I am certainly entitled to show that.

The Court: So that we have this in the record here, the one other qualification is that he did not interview the plaintiff or any members of the Police Department.

Mr. Reuben: He was not sure whether he had interviewed—

Mr. Kaveny: It is your proof, not mine.

The Court: We have just that, and I think we have it covered. He did not interview them. Would that be agreeable?

Mr. Kaveny: Your Honor, my problem with this each time it is presented back to you by the defendant is that we have this idea that Mr. Wolf made a determination of facts.

Mr. Reuben: Well, I think he did.

Mr. Kaveny: I do not find that.

The Court: He reported back.

[292] Mr. Kaveny: I understand that, but I want it clearly understood as to who he went to so that there is not this idea that he has made a determination in his report. He reported the substance of his interviews, he reported whatever you want to say, but each and every time it comes out it sounds like Mr. Wolf made a determination and it was based upon his determination. The jury did not understand the word "report". I think that if we suggest that he reported the substance of his interviews or submitted a report based upon his interviews—

The Court: Let me say this: I will recess for five minutes so that you two gentlemen can sit down and put it in writing so that we will have no question on it. Mr. Reuben, you can certainly put down what you said in three, four or five minutes. I have given my ideas on it, and if there is any change that you have

you can put it in writing and then we will have it so that it will be clear.

Mr. Reuben: I will try, your Honor. I do not mean to be disrespectful to Mr. Kaveny, but I have never agreed with my wife and I would rather try to [293] take it up with her than Mr. Kaveny.

The Court: You gentlemen have gotten along very well and I do not think we will have any problem.

I will recess for five minutes.

(A short recess was taken, after which the following further proceedings were had in open court, in the presence and hearing of the jury to wit.)

[294] The Clerk: The case on trial.

The Court: Have you gentlemen agreed on the order of procedure here now?

Mr. Reuben: Yes, your Honor.

The Court: So we have no problems after I bring the jury in?

Mr. Reuben: Yes.

Mr. Kaveny: I do not know what the procedure is.

Mr. Reuben: Well, I am going forward.

The Court: Yes.

Mr. Kaveny: I understand that.

The Court: If there are any rulings to be made, I want to make them now. I indicated that I did not want to get into—what is the name of the lady?

Mr. Reuben: Karen Booth.

The Court: Yes. You have to conform the deposition to the order of the exhibits as they have been introduced.

Mr. Reuben: That is being done, your Honor.

The Court: It is being done.

Mr. Reuben: Yes.

The Court: I just wanted to be sure we did not [295] get into it now.

Mr. Reuben: All right.

The Court: Are you ready to proceed, then?

Mr. Reuben: Yes.

The Court: Bring the jury in.

(Whereupon the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

The Court: Good morning, ladies and gentlemen. I regret that you had to wait so long in the jury room, but the Court had an exceptionally long motion call, with many matters to pass on, and there were certain details of this trial I had to discuss with counsel in that the plaintiff has rested, and we will now proceed with the defendant's case.

Are you ready to proceed, Mr. Reuben?

Mr. Reuben: I am.

The Court: You may proceed.

Mr. Reuben: The first thing I would like to do, since it has not been done yet, is to read to the jury from the TIME article that is involved in this lawsuit, [296] if I may, your Honor.

The Court: You may.

Mr. Reuben: It is captioned, "Civil Rights", and it is from the November 24th, 1961 issue of TIME. It has the heading, "Dawdling on the Corner".

"The new paperback book has 307 pages and the simple title, 'Justice'. It is the last five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957.

"Justice carries a chilling text about police brutality in both the South and the North, and it stands as a great indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprised the Commission."

Here is a footnote. The footnote says:

"Members of the scholarly panel: Chairman, Dr. John A. Hannah President of Michigan State Univer-
[297] sity, Dr. Robert S. Rankin, Chairman of Duke University's Political Science Department, Robert G. Storey, former Dean of the Southern Methodist University Law School, Spotswood W. Robinson III, Dean of Howard University Law School, Irwin M. Griswold, Dean of Harvard Law School, the Rev. Theodore M. Hesburgh, President of Notre Dame University."

The Report then proceeds in the text:

"The bluntly frank report tells of a police officer referred to only as Y in Dawson, Georgia, who arrested Negro James Brazier for speeding in November, 1957. It quotes Brazier: 'When I first entered the door of the jail, Y hit me on the back of the head and knocked me down and said, "You smart son of a bitch, I've been wanting to get my hands on you for a long time." I said, "Why you want me for?" Y said, "You is a nigger who is buying new cars and we can't hardly live. I'll get you yet."

[298] "When Brazier was arrested again five months later by the same officer, Brazier's wife related: 'Y then said, "I told you I would get you." James said, "What do you want to hurt me for? I ain't done nothin'. I got a heap of little chillun." Y said, "I don't give a goddam how many children you've got, you're going away from here." Y pulled out his pistol and stuck it against James' stomach".'

Continues the report:

"Brazier's ten-year-old son pleaded with the officer to stop beating his officer and was knocked to the ground by Y. The victim was thrown onto the floor

of the police car with his legs dangling outside. Y kicked him twice in the groin, slammed the car door on his legs, threw a handful of sand into his bloody face and drove off. Brazier died five days later and Y was never punished."

[299] "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by thirteen police officers ostensibly investigating a murder. The police, says Justice, 'broke through two doors, woke the Monroe couple with flashlights and forced them at gunpoint to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy." Another officer pushed Mrs. Monroe, other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothes from closets to the floor, dumping drawers, ripping mattress covers.'

"The officers were not punished, although Monroe has carried a suit to the Supreme Court and is [300] still seeking a civil judgment."

The next heading is "Nursing and Flouting."

"The Commission's report concedes that such cases may be 'more dramatic than most', but it declares that police brutality is 'a serious problem throughout the U. S.', that Negroes suffer it most and that 'there are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes.'

"To remedy the situation, the Commission recommends federal grants to upgrade state and local police forces, a federal law permitting police victims to sue local governments instead of only the officers, who can seldom pay adequate judgments, and an amendment to federal law specifically banning police brutality and forced confessions.

"Going beyond the report of the panel, Father Hesburgh issued a separate statement: 'Personally, I don't care if the U. S. gets the first man on the moon if, while this is happening on a crash basis, we dawdle along here on our corner of the [301] earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times and appearing hypocrites to all the world.' "

That is the end of the article.

The Court: All right.

Mr. Reuben: Your Honor, I would now like to offer Defendant's Exhibit A, marked for identification, which is a complaint filed in this court, in the United States District Court for the Northern District of Illinois, Eastern Division, being James Monroe, Flossie Monroe and several minor children, vs. Frank Pape, et al., No. 59 C 329.

[302] The Court: Is there any objection?

Mr. Kaveny: Yes, your Honor, as stated previously.

The Court: All right. The Court has considered those objections, and the objections heretofore made may be incorporated in and made part of this record, and the objections are overruled.

Mr. Kaveny: Thank you.

The Court: It may be admitted into evidence.

(The document previously marked Defendant's Exhibit A for identification was thereupon received in evidence.)

The Court: You may proceed.

Mr. Reuben: I would now like to offer in evidence what has been marked Defendant's Exhibit B for identification, which is an official document of this Court dated December 4th, 1962, in which there is a jury verdict, finding:

> "We, the Jury, find in favor of the plaintiff, James Monroe, and against the defendant, Frank Pape, [303] and we assess his damages in the sum of $5,000",

and then there is a signing of the verdict by the jury.

Mr. Kaveny: That is also objected to on the same grounds, your Honor.

The Court: The Court has considered that objection heretofore and the objection made at that time and the grounds for it is incorporated in and made a part of the objection stated at this time, and the objection is overruled

> (The document previously marked Defendant's Exhibit B for identification was thereupon received in evidence.)

Mr. Reuben: I would now like to offer in evidence Defendant's Exhibit C for identification, which is a verdict of the same date by the same jury and reads:

> "We, the Jury, find"—

The Court: Let's have the objection stated. You object to this?

Mr. Kaveny: For the same reasons.

The Court: On the same grounds?

Mr. Kaveny: Yes.

[304] The Court: Let the record show your objection on the same grounds as to Exhibit B, and the objection is overruled.

Mr. Kaveny: Thank you, sir.

> (The document previously marked Defendant's Exhibit C for identification was thereupon received in evidence.)

Mr. Reuben: This, your Honor, is a verdict by the same jury.

> "We, the Jury, find in favor of the plaintiff, Flossie Monroe, and against the defendant, Frank Pape, and we assess her damages in the sum of $3,000."

I now offer what is a minute order of this Court, marked Defendant's Exhibit D for identification, which is a summary of all of the verdicts before this Court.

The Court: All right. Let the record show the same objection.

Mr. Kaveny: The same objection, your Honor.

The Court: The objection is overruled on the same [305] grounds, and you may have a continuing objection, so it will not be necessary to repeat it, as to the other documents to be offered.

Mr. Kaveny: Thank you.

> (The document previously marked Defendant's Exhibit D for identification was thereupon received in evidence.)

Mr. Reuben: I would now call Mr. Magnuson on behalf of the defendant.

The Court: All right.

Mr. Reuben: He has previously been sworn.

The Court: Yes.

EDWARD F. MAGNUSON, called as a witness on behalf of the Defendant herein, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Reuben.

Q. Ed, will you tell the jury where you—

The Court: Let's have him state his name again—

[306] Mr. Reuben: All right.

The Court: —so the record will reflect that.

By the Witness: A. My name is Edward F. Magnuson.

By Mr. Reuben: Q. Now, Ed, will you tell the jury where you started journalism training, after school where you worked?

A. I went directly from journalism school at the University of Minnesota, to the Minneapolis Tribune.

Q. You are a Middle Westerner?

A. Yes. I grew up in St. Cloud, Minnesota.

[307] Q. What did you do in Minneapolis?

A. I worked there for ten years and covered a variety of beats, from the police beat, politics, did a lot of reporting around the state in small towns, and was Assistant City Editor at one time.

Q. Then did you go to work for Time, Incorporated?

A. Before that I worked for TIME while on the Minneapolis Tribune as what they call a stringer.

Q. Tell the jury what a stringer is.

A. This is a local reporter who takes assignments from TIME in New York and reports on things in his area and files them to New York.

Q. Then subsequently did you go to work full time for TIME?

A. That is right. In 1960 I was asked to join TIME. I became a correspondent in Los Angeles.

Q. Then calling your attention to 1961, where were you or what did you do?

A. At that time I had been invited to be a writer [308] in New York. I was writing national affairs at that time.

Q. At TIME's New York office, is that correct?

A. That is right.

Q. Now, you wrote what was the article that I read here earlier to the jury, did you not?

A. I did, sir.

Q. Would you tell the jury what happens to a piece

after the first draft by an author such as yourself. What is TIME's usual procedure in verifying the truth or accuracy of articles that it publishes?

Mr. Kaveny: Objection, your Honor.

The Court: On what ground?

Mr. Kaveny: We are not concerned with what the usual procedure is. We are concerned with what was done in this particular article.

The Court: The objection is overruled.

Mr. Reuben: Go ahead. The Court has ruled that you may answer.

[309] By the witness: A. The procedure is for the writer to prepare his story. He turns it in to a desk where it is typed. Copies go to a researcher who is also assigned to the story to check the story for accuracy. Copies also go to the Senior Editor and then a copy goes to the Managing Editor.

The researcher sits down with all the material she has and goes over the story. Her job is to check it for accuracy. She has the same material that the writer has, plus anything else that is in our library or that she can get from other correspondents in the entire system around the country.

The story is not approved for publication until she says that it is basically correct.

By Mr. Reuben: Q. Now, was there a researcher in connection with the story involved in this suit?

A. There was.

Q. Her name was what?

A. Karen Booth Berger.

Q. Where is she now?

[310] A. She has left TIME because she had a child. She is in New York.

Q. What is her condition?

A. She caught the 'flu that is going through New York at this time.

Q. Now, yesterday Mr. Kaveny asked you what you had before you and one of the things you said you had before you was Defendant's Exhibit E, the Civil Rights Commission report that is in evidence, Justice.

A. That is right.

Mr. Reuben: May I hand it to the witness, your Honor?

The Court: You may.

By Mr. Reuben: Q. In the article you published, what were you intending to communicate to the public, or what were you intending to write in connection with that article?

A. We were attempting to report the findings of this governmental commission. That was the news.

[311] Q. Did you believe that those findings were true?

A. I certainly did.

Q. Would you tell the jury why you believed those findings were true, in as great detail as you can?

A. Well, this is a high level commission reporting to the President of the United States, making its report and its findings after careful and long investigation.

I think the caliber of the people convinced me first that they would not be sending us a report—

Mr. Kaveny: Your Honor, may I interpose an objection?

The Court: Yes.

Mr. Kaveny: This is highly improper.

The Court: The statement being made here?

Mr. Kaveny: The statement being made, why he believed it to be true and his opinion as to whether it was or was not true.

Mr. Reuben: May I approach the bench?

[312] The Court: It is not necessary to approach the bench. This is the statement of this reporter as to why he took these findings and all, and wrote the article. The objection is overruled.

Mr. Reuben: The Court has ruled that you may continue to tell the jury.

By the witness: A. I did not think a commission of this high caliber, dealing with such a serious matter, would distribute this to all the newspapers if they thought anything in it was incorrect.

By Mr. Reuben: Q. Do you know any of the members of the Commission?

A. I have met Father Hesburgh of Notre Dame, and John Hannah of Michigan State.

Q. Very good. Continue. I am sorry to have interrupted you.

A. Then beyond that, the Commission itself says in Chapter 2, at the beginning:

"We will include nothing"—

The Court: Can you hear the witness, Mr. Kaveny?

[313] Mr. Kaveny: Yes, sir, I can.

The Court: All right.

Mr. Kaveny: Thank you.

The Court: I just wanted to be sure.

By the witness: A. The Commission says:

"We will include nothing in this report that we do not consider substantial."

By Mr. Reuben: Q. Could you read that paragraph that you are referring to in Chapter 2?

A. The entire chapter—the entire paragraph?

Q. Yes. Could you?

A. (Reading:)

"In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality. They are presented in the belief that they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions or findings [314] by impartial agencies; in others, by sworn testimony, affidavits from eyewitnesses, or by staff field investi-

gations. In no case has the Commission determined conclusively whether the complaints or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in this study."

Q. What did you believe from that paragraph, sir?

A. That the entire Commission is standing behind what it is reporting in this document and that it would not include just any allegation by one person.

Q. What else within the four corners of Justice made you think that the report from Justice was true?

A. Well, for one thing, the title of this chapter is, "Unlawful Police Violence." It does not say "Alleged Police Violence."

[315] Then they go onto a subheading which says, "Patterns of Police Brutality."

There is nothing about alleged, nothing about any doubts in the Commission's mind. The reference to the Pape incident is called, "Search, Seizure and Violence in Chicago." There is nothing about its being alleged or in any way doubtful, so this led me to think that it was entirely, convincingly true.

Q. Did you have a conversation with the researcher, Karen Booth, after she had finished her inquiry?

[316] A. Yes. It's customary to go over the story with the researcher after she has done all of her checking, and at that time she raises any questions she might have about the story.

Q. Did she indicate that there was a file about Captain Pape in TIME's records?

A. She said that there was quite a bit of material on Captain Pape and on the Monroe case in the library that other newspapers had published reports of that incident.

Q. Did she ever indicate in any way to you that the article was not true?

A. She raised no questions about the accuracy of the article at all.

Q. Did you believe that your article, when it appeared in TIME magazine, was true?

A. I certainly did.

Mr. Reuben: I have no further questions.

Mr. Kaveny, you may inquire.

The Court: You may cross-examine.

Cross-Examination by Mr. Kaveny.

Q. Mr. Magnuson, you mentioned a moment ago that in reviewing the second chapter of Justice you felt [317] it was truthful, that you found no references, or I should say qualifications, in the statements made in the chapter, is that true?

Mr. Reuben: I object. That is an unfair characterization of the witness' testimony.

The Court: I would not say that it is unfair, but it is not a statement of the witness' testimony. I am sure it was inadvertent.

By Mr. Kaveny: Q. You stated, I believe, that in the running head—

Mr. Kaveny: May I see yours, sir. I do not have the full thing.

The witness: Surely.

By Mr. Kaveny: Q. In the running head of "Unlawful Police Violence", you found no words reading "alleged", is that right?

A. That's right.

Q. Am I correct in saying, sir, that you said you felt it was true because there was no qualification?

A. That's right, sir.

[318] Q. Then, on Page 6 again you found no "alleged" in front of "Patterns of Police Brutality", is that right?

A. That's right.

Q. Therefore you found no qualification?

A. That's a flat statement.

Q. You felt it was truthful?

A. That's right.

Q. On Page 20, sir, regarding Captain Pape, you said that it read, and I am reading for you, sir, "Search, seizure, and violence: Chicago, 1958."

A. That's right, sir.

Q. Am I correct that you said you did not find the word "alleged"?

A. That's right, sir.

Mr. Reuben: I object to the statement. The witness did not find it in that title.

Mr. Kaveny: I will accept the qualification, Mr. Reuben.

The Court: All right.

Mr. Reuben: Thank you.

[319] By Mr. Kaveny: Q. Now, sir, would you read for the jury—

Never mind; I will read it for you. I am reading after the words, "Search, seizure, and violence: Chicago, 1958:

> "The Supreme Court of the United States decided the case of Monroe v. Pape on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:"

You did read that?

A. I certainly did, right.

Q. You understand, as a former police officer, what a complaint is?

Mr. Reuben: I object. The witness never said that he was a former police officer.

Mr. Kaveny: I beg your pardon. I beg the pardon of the Court and jury. That was purely unintentional. I meant to say former police reporter.

[320] By Mr. Kaveney: Q. You did state that you are a former police reporter?

A. That's right.

Q. You understand the word "complaint"?

A. That's right.

Q. You understand the word "alleged"?

A. That's right.

Q. Therefore, while you did not find the word "alleged" in the running head, "Search, Seizure and Violence: Chicago, 1958", you did find it in the body, is that right?

A. I did, sir, yes; right.

Q. You found the word "complaint"?

A. That's right.

Q. That said something to you other than the lack of the word "alleged" in the title "Unlawful Police Violence"?

A. But the word "alleged" there cannot be taken just in that context. It has to be taken in the context of the entire chapter.

Q. I understand you, sir.

However, when we get down to Captain Pape, the word "alleged" has something very definite in mind, does it not?

[321] Mr. Reuben: I object. The witness has just answered that question.

The Court: No, this question is framed differently. He may answer. Have you finished your question, Mr. Kaveny?

Mr. Kaveny: Yes, sir.

By the Witness: A. The Commission is, in this case—

Mr. Kaveny: May I have the question, Miss Reporter?

Q. (Read by reporter.)

By the Witness: A. Well, I just don't know what you mean by that, that it has something definite in mind.

By Mr. Kaveny: Q. Well, I will read it again, sir.

It say, ". . . on the basis of a complaint which alleged . . ."

Mr. Reuben asked you a moment ago to tell us what you thought, so suppose you now tell me what you think. What did you think when you read, ". . . on the basis of a complaint which alleged . . ."? Tell us what that means to you.

A. That means to me that the Commission in [322] this case is reporting this incident in terms of a claim being made in a court by the Monroes, but you can't stop there.

Q. That does not tell me, sir.

The Court: Let the witness finish answering. Proceed.

By the Witness: A. (Continuing) But in the context of the entire chapter, it is not a simple allegation because the Commission has also said that we will not include just an allegation that we have not verified in some fashion.

[323] Q. That is your conclusion from having read, ". . . on the basis of a complaint which alleged . . ."?

A. I read the entire chapter.

Q. There is more here than just an allegation or a complaint?

A. In the context of this report there is more than an allegation involved here; that's right.

Q. You did not understand this as simply the complaint of James Monroe as filed in a court suit?

A. I know they were citing the complaint of James Monroe.

Q. However, you understood that there was more to it than that?

A. That's right.

Q. I asked you before and I will ask you again, sir: Is there any place in Justice besides Page 20 where the activities of Frank Pape appear?

A. I am not sure it's just Page 20. Doesn't it go over to the next page?

Q. I beg your pardon. That is Pages 20 and 21, the article we have in question that you used in your article.

[324] Am I correct, sir, that the activities of Frank Pape appear nowhere but on Pages 20 and 21 of this volume?

A. That's correct, sir.

Q. In addition to this, in writing your article you had in front of you the press release issued by the U. S. Commission on Civil Rights?

A. That's right.

Q. There was no mention there of Captain Frank Pape's activities?

Mr. Reuben: Your Honor, this is beyond the scope of the direct, I believe.

Mr. Kaveny: Mr. Rueben asked what references he used.

Mr. Reuben: No, I do not think so.

The Court: Yes, you asked him about it.

Mr. Reuben: I asked about Justice, but I will withdraw the objection. I do not see any harm in it, but I am just trying to shorten the time.

The Court: All right; proceed.

Mr. Kaveny: May I have the question back, please.

Q. (Read by the reporter.)

[325] By Mr. Kaveny: Q. That is in the press release?

A. That's right, sir.

Q. Lastly, when you wrote this article you had the New York Times article involving the release of Justice, is that right?

A. That's right.

Q. There is no mention in that of Captain Frank Pape's activities?

A. There was none.

Q. Now, sir, at the bottom of your article you list some recommendations made by the Commission, and among the recommendations made by the Commission are that there should be federal law to permit police victims to sue local

governments instead of only the officers, who can seldom pay adequate judgments.

That is in your article, correct?

A. That's right, sir.

Q. Now, this article here says that it did not finally dispose of the case, meaning the Pape case, but it did permit the plaintiffs to sue the Chicago police officers for violation of their federal civil rights.

[326] Is the newsworthiness of this particular item on Captain Frank Pape that police officers can be sued in the federal courts?

A. No, that is not the news value of this story, of that incident at all.

[327] Q. The quoted material in your article which you took from Pages 20 and 21 was itself indented at the center of the page, right?

A. That's right.

Q. That itself was a quotation from something else?

A. That's right.

Q. Do you have any idea what the quotation is from?

A. No. Well, it says it's from—

Mr. Kaveny: May I assist you?

(There was a short interruption, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury:)

By the Witness: A. It is from the complaint filed by the Monroes.

By Mr. Kaveny: Q. You do not understand that language in there as being from the complaint itself, do you?

A. That is the way I read it, yes.

[328] Q. Is there any indication there of any other source where the Commission editors got that? It is indented. Is there any indication in there, any footnote, where they might have gotten that from?

A. There is a footnote here, right.

Q. What is the footnote?

A. Footnote 83.

Q. Do you want to turn to 83 and see where it leads us?

A. Should I read Footnote 83?

Q. I would appreciate it, yes.

A. It says:

"18 U. S. C. sec. 1581 (1958) Peonage; Obstructing Enforcement: (a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years or both."

Q. You can stop there, sir. If Mr. Reuben cares [329] to go on, fine.

Would you kindly check Footnote No. 82? I had the wrong footnote.

A. 82 says:

"United States v. Dial, Crim. No. 1348, N. D. Ala., May 14, 1954."

Mr. Kaveny: May I have the volume back, sir.

(There was a short interruption, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury:)

Mr. Kaveny: I see where we were mistaken, sir. We were both misled on this. Each chapter has its own set of footnotes.

By Mr. Kaveny: Q. I have turned now to Chapter 2's footnotes. Would you again read Footnote No. 83?

A. 83:

"These are the words of Justice Frankfurter in disset, 365 U. S. at 203-204."

Q. Now, did you happen to read that footnote at [330] the time you were preparing your article?

A. I don't recall reading the footnotes, no.

Q. Does that footnote indicate to you that the words of this quotation come from somewhere other than the complaint?

A. Yes. This indicates that the words are those of Justice Frankfurter.

Q. In his dissenting opinion, is that right?

A. That's right.

Q. That is what it says there; in Monroe vs. Pape?

A. I don't know if this is Monroe vs. Pape.

Q. I am sorry, sir. It gives you a United States Supreme Court citation of an opinion, is that right?

A. Right.

[331] Q. This particular quoted material here, which is indented, is a continued sentence broken by semicolons, is that correct?

I will return it to you now, sir.

A. I don't think it's a complete sentence because I don't think it starts with a subject and a verb.

Q. Am I correct, sir, that from an English point of view you would have to pick up the sentence, with "Although this decision did not finally dispose of the case . . . on the basis of a complaint which alleged that:"

That is the commencement of that sentence, right?

A. That's right.

Q. Then there is a continuation, all in one sentence, that runs on to Page 21 of a series of clauses separated by semicolons?

A. That's right.

Q. Also, each one of these clauses is opened by the word "that", is that correct?

A. That's correct.

Q. In drafting your article, you eliminated the [332] introduction?

A. That's right.

Q. "... on the basis of a complaint which alleged that:"

A. Yes, sir.

Q. You commenced each one of these clauses with the word "the"?

A. That's correct.

Q. You eliminated the semicolon and put a period on it?

A. That's right.

Q. Did you understand, sir, or did you have an opinion that you were changing the sense of this article?

A. I didn't think this changed the meaning, breaking this up into—

Q. Was there any editorial—

Mr. Reuben: Your Honor, he is not allowing the witness to finish his answer.

The Court: Have you finished your answer?

By the Witness: A. (Continuing) I just wanted to say that breaking the long paragraph into short sentences [333] I thought made that clearer, added to the meaning.

By Mr. Kaveny: Q. I'm sorry.

A. It made it clearer to a reader.

Q. It made it clearer to a reader?

A. Right.

Q. In your opinion, sir, as an editorial writer, did it make it clearer to the reader that these were allegations of a complaint?

A. We were not trying to say this.

Q. My question, sir—

Mr. Reuben: Your Honor, Mr. Kaveny will not let the witness finish his answer.

Mr. Kaveny: I certainly will, when he will answer my question.

The Court: Will you read the question?

Q. (Read by the reporter.)

The Court: You can answer that yes or no. You may answer the question.

By the Witness: A. No, it does not make it clearer [334] to the reader that this is an allegation, but it wasn't just an allegation.

Mr. Kaveny: All right, sir.

By Mr. Kaveny: Q. In your opinion as an editorial writer, does that make it clearer to the reader that there was a finding by Justice that these particular acts were committed by these police officers?

A. I don't understand.

Mr. Kaveny: Will you read the question, please.

Q. (Read by the reporter.)

By the Witness: A. Well, we had already said in the article that any allegation here has been investigated.

By Mr. Kaveny: Q. I understand that, sir.

A. We were talking about findings.

Q. Now, may I have your answer to my question?

A. Those changes are immaterial to whether it makes it—

Q. I asked for your opinion.

[335] The Court: Let the witness finish answering. You may strike it if it is not responsive.

Finish your answer.

By the Witness: A. (Continuing) I don't see how the changes in that wording relate to whether this is a finding or not.

Mr. Kaveny: I disclaim the answer and ask that it be answered again, sir.

Mr. Reuben: I think that was a perfect answer to the question.

The Court: The answer may stand.

By Mr. Kaveny: Q. Were you aware, sir, of any

editorial policy of TIME Magazine that dictated the changes that you made?

A. Well, there's no firm editorial policy, but in a general way you want to make each paragraph as direct, with short sentences, make it as clear as possible.

Q. Clear and concise?

A. That's right.

Mr. Kaveny: I have no further questions of the [336] witness.

Mr. Reuben: You may step down.

The Court: Do you have any further questions?

Mr. Reuben: No, your Honor.

The Court: All right.

January 15, 1969,
2:00 o'clock p.m.

Court resumed pursuant to a recess.

Present:

Mr. Kaveny, appeared for Plaintiff;

Mr. Reuben, appeared for Defendant.

(Whereupon the following further proceedings were had herein, in open court, in the presence and hearing of the jury:)

[338] The Clerk: Case on trial.

The Court: Good afternoon, ladies and gentlemen of the jury; good afternoon, Counsel.

Are you ready to proceed, Mr. Reuben?

Mr. Reuben: Yes, your Honor. If your Honor will recall, Karen Booth, according to Mr. Magnuson, like many others, is down with the 'flu, so with leave of court, I will read the sworn testimony of Karen Booth to the jury in

lieu of Karen Booth's presence. With the Court's permission, I have asked a young lady from our law office, who is a lot prettier than I am, to come in and play Karen Booth's part, so we can then read the questions and answers exactly as if Karen Booth were here.

The Court: So that we have complete understanding, you proceed with your questions, and if there are any questions that you do not desire to ask, Mr. Kaveny has the right to ask those questions and your witness will respond to those questions in the same manner as is usual in depositions.

Is that agreeable to both sides?

Mr. Kaveny: Yes, it is, your Honor. Thank you.

[339] The Court: All right. You may call your prospective witness.

Mr. Reuben: This is Christine Flowers, your Honor, and ladies and gentlemen of the jury. For the purposes of this lawsuit, she is Mrs. Booth.

The Court: All right. You may proceed, Mr. Reuben. Refer to the pages that you are going to read from from time to time.

Mr. Reuben: Yes, sir. I am now at Page 5.

The Court: All right. May I inquire, are there any questions that you have to ask which are before Page 5 in the transcript?

Mr. Kaveny: Do you mean on Pages 1 through 4, your Honor?

The Court: That is correct.

Mr. Kaveny: No, your Honor.

The Court: All right. You may proceed, Mr. Reuben.

[340] (The deposition of Karen Booth was thereupon read, the questions being read by Mr. Reuben, and the answers being read by Miss Christine Flowers, as follows:)

"KAREN BOOTH, called as a witness by the Plaintiff herein, having been first duly sworn by the Notary Public, was examined upon oral interrogatories, and she did thereupon depose and testify as follows:

"EXAMINATION

By Mr. Reuben: (Reading): Q. Mrs. Booth, for the record, will you state your name and address.

A. Karen Booth; my address is 21 East 94th Street, New York City.

Q. Mrs. Booth, you were employer by TIME, INC., in 1961?

A. Yes, I was.

Q. And at that time was your name Booth?

A. My maiden name was Burger.

Q. And you were employed as Karen Burger; [341] is that correct?

A. That is correct.

Q. In what capacity were you employed at that time?

A. As editorial researcher.

Q. When we refer to TIME, INC., do we understand that this is also the news magazine, TIME?

A. That is correct."

Mr. Reuben: Page 6, your Honor.

"Q. When did you first start working for TIME, INC.?

A. In the fall of 1954.

Q. In what capacity were you employed then?

A. I was hired in a training job known as the news clip desk.

Q. You referred a moment ago that in 1961 you worked as a researcher.

A. That is correct.

Q. When did you first start working in that capacity?

A. In 1955.

Q. Will you tell me briefly what the job of researcher [342] is at TIME, INC.?

A. The basic responsibility of the researcher is for the factual accuracy of the story as it appears in the publication 'TIME' Magazine.

Q. I would like to show you what has previously been identified in this proceeding as Defendant's Exhibit F,"—

Mr. Kaveny: Objection, sir.

The Court: On what grounds?

Mr. Kaveny: You are reading Line 23 on Page 6?

The Court: Yes.

Mr. Kaveny: You interpolated the word "Defendant."

Mr. Reuben: Yes, of course I did. I thought that that was the understanding, that we would change that.

Mr. Kaveny: I beg your pardon. I do not have it marked here.

The Court: We were to make this conform to the stipulation on the documents. I had asked that that be done.

Mr. Kaveny: I apologize, your Honor.

[343] The Court: That is all right.

You may proceed, Mr. Reuben.

By Mr. Reuben: (Reading:) "Q. I would like to show you what has previously been identified in this proceeding as Defendant's Exhibit F, which is the cover of 'TIME' Magazine for November 24, 1961, and Pages 15 and 16 of that magazine of that particular issue and particularly the article which commenced on Page 15 called 'Civil Rights' and ends up on Page 16, and I will ask you if you will examine that, and then if you will tell me whether or not you performed any work in connection with the preparation of that particular article.

A. Yes. I was the researcher on this particular article.

Q. Do you recall now when you were first directed to do any work on that particular article?

A. My recollection is that it would have been Friday, November 17th.

Q. May I ask you how you can be so accurate?

A. Because it is my memory that that story was written on that Friday, and as I recall we received [344] the report from the United States Commission on Civil Rights, I believe, that day.

Q. Who, if you recall, at 'TIME' assigned you to do this article? To do the research for the article?

A. To the best of my recollection it was probably the head researcher of the section.

Q. Do you recall the name?

A. Amelia North.

Q. I take it that you received that assignment on November 17th.

A. To the best of my recollection, as I said.

Q. Do you recall what words the woman used in making this assignment, or was it oral, or were you given some note or something like that?

A. I cannot recall exactly. It was probably oral.

Q. As a researcher, when you were given this assignment, what did you do?

A. As a researcher I received notice that I was to research the story. The first thing that I did was to read the United States Commission on Civil Rights [345] Report, and the section with which we were concerned was on police brutality as called therein.

Q. What else did you do?

A. I read the Commission's report.

I received the story after it was written, and I thereupon checked it against the United States Commission on Civil Rights Report, the section called 'Police Brutality,' and I thereupon called up the Bureau of Editorial Reference, which is also called the morgue, and asked

for all the material on Mr. Monroe and Mr. Pape to see what other substantial information we had.

Q. Did Mrs. North direct you to read this or did someone else direct you to read it, or did you just read on your own volition?

A. I read it because this was my job.

Q. Do you recall who gave you the volume called 'Justice'? Do you recall how you received it?

A. I don't recall who would have handed it to me, no.

Q. But it did end up on your desk, is that it?

[346] A. That is correct.

Q. Do you recall who directed you to pay particular attention or to read in particular the section on police brutality, or however you described it a moment ago? Did someone tell you to do this, or did you just thumb through the magazine and come up with this?

A. This was the decision of the editor. The Commission report was divided into two sections, the one on police brutality, the last one Indians.

And I was told that we would only be concerned with the first part of the report, which is what I read, on police brutality.

Q. Using the contents of the volume 'Justice,' Volume V of the United States Commission on Civil Rights Report, 1961, called 'Justice,' the index on it indicates that there is an introduction and unlawful police violence commences on Page 5 and it runs to page 113.

Is that the area of that particular volume that you read?

A. I read the foreword, and I read the section [347] called 'Equal Justice Under Law', and I read it through to page 113, which is the whole section on 'Equal Justice Under Law.'

Q. And page 114 is where the American Indian commences?

A. That is right.

Q. Now, a moment ago you said that some time thereafter you received the article and you checked it for accuracy against the volume 'Justice'. The article that you are referring to, is that the one that appears in the November 24th issue, 1961, of 'TIME'?

A. That is correct.

Q. I believe then you said that you thereafter called for the morgue file?

A. That is correct.

Q. Would you look at Defendant's Exhibit F, No. 1, Pages 15 and 16, the article in question, the 'TIME' article in question, and would you tell me if that article is in substantially the same form as when you read it and as you said a moment ago and checked it for accuracy against Volume V.

A. Yes, it is.

[348] Q. Mrs. Booth, as the researcher would it be your job to make any additions or corrections or deletions to any article that you received to be checked for accuracy?

A. It would be my job to make any corrections for factual accuracy; that is correct.

Q. In making these corrections, would you simply pen a note to the author, or would you make them on the proof or on the article itself.

A. In conjunction with the editor and the writer, such changes would be made."

Mr. Reuben: I am now going to Page 14, your Honor.

The Court: All right.

By Mr. Reuben: (Continuing reading:) "Q. If you would look at the article, particularly Page 15 of Defendant's Exhibit F, you will note there is certain matter, I believe it is in the first or second paragraph which is in quotation marks, commencing with the words, 'Justice says,' and there are quotation marks around three-

quarter of that particular paragraph. Do you see the place?

A. Yes, I do.

[349] Q. Do you recollect whether or not you checked the quoted matter with any matter contained in Volume V of 'Justice'?

A. Yes, I did. I checked it against 'Justice.'

Q. I will show you now what has previously been identified or marked as Defendant's Exhibit E, which is Pages 20 and 21, Volume V of 'Justice', and you will note toward the bottom of page 20 there is some material indented. And the language ends off, 'on the basis of a complaint which alleged that', and a colon, and then some indented material.

Mrs. Booth, with regard to the material appearing within quotes on page 16, could you tell me what part of 'Justice' you checked against that quoted material, or the material within the quotation marks.

A. I quoted our paragraph which is in quotation marks as against pages 20 and 21 of 'Justice.'

Q. In what particular part of pages 20 and 21 of 'Justice'?

A. The indented material.

[350] Q. The indented material which begins, 'On October 29, 1958'?

A. That is correct.

Q. And which ended up on page 25, 'without criminal charges having been filed against him'?

A. That is correct.

Q. Did you notice in checking the matter within the quotation marks with that, any discrepancy?

A. I do not believe that my writer used the full statement in his story in the 'TIME' Magazine.

Q. You are referring now when you say he did not

use the full story, you are referring to the matter within the quotation marks?

A. The full quotation.

Q. Did you in any fashion call this to Mr. Magnuson's attention?

A. This was not my function as a researcher. The writer had chosen in conjunction—"

Mr. Kaveny: Objection, your Honor.

The Court: Yes?

Mr. Kaveny: There is an objection.

[351] The Court: In other words, the motion to strike?

Mr. Kaveny: That is right, your Honor. The question asked, sir, is: "Did you call this to Mr. Magnuson's attention?" The answer is, "This was not my function as a researcher."

Mr. Reuben: If I may suggest, the rest of it is certainly a part of the answer.

The Court: It may be read. The objection is overruled.

Mr. Reuben: You may continue your reading, Chris. "This was not my function as a researcher", and then what?

By the Witness: (Continuing reading:) "The writer had chosen in conjunction with the editor which material they were going to use out of this particular quotation. And checking back with my own editorial reference files, I believe that what we printed was an accurate representation and we were not taking anything out of context."

By Mr. Rueben: (Continuing reading:) "Q. Mrs. Booth, after determining that the writer had not set forth [352] within quotation marks all of the material contained at the bottom of Pages 20 and 21, did you call this to anyone's attention?

A. I don't actually recall, but it was not my function to see whether the whole statement was—

Q. The question was did you call it to anyone's attention?

A. I do not actually recall whether I did or not."

Mr. Reuben: I am now going, your Honor, to Page 21.

By Mr. Reuben: (Continuing reading:) "Q. Mrs. Booth, as I hand each one of these items or documents to you, will you first examine it and then give us just a very brief description of what it is by date and brief description, and we'll then ask the Reporter to mark each one for identification in this deposition."

Mr. Reuben: They are all in evidence, your Honor, [353] but I will ask the young lady to read the answers.

The Court: That is all right. Is there any objection to that?

Mr. Kaveny: It appears in the deposition, your Honor, just to make it a matter of record.

The Court: I did not quite understand what you meant by that.

Mr. Kaveny: There are certain exhibits to be identified at this point in the record.

The Court: Yes.

Mr. Kaveny: At this point I have an objection regarding those exhibits, and I am simply making it a matter of record at this point.

The Court: I do not have the list here. Are any of these documents that were not stipulated to?

Mr. Reuben: No, your Honor.

Mr. Kaveny: These are the documents that we objected to as to their admission, but the Court has ruled contrariwise. I am simply making that objection as a matter of record.

[354] The Court: All right. You have that right. The objection as made at the pretrial conference will stand as though made now, and that objection is overruled.

Mr. Kaveny: Thank you, sir.

Mr. Reuben: Read now, please, Lines 19 through 22.

By the Witness: (Continuing reading:) "A. Defendant's Exhibit I is an article by Fletcher Martin that appeared in the 'New York Post' on Monday, February 27th, 1961. It consists of an interview that Mr. Martin had with Mr. Monroe with direct quotations."

Mr. Reuben: If you will go to Page 23, please.

By Mr. Reuben: (Continuing reading:) "Q. Mrs. Booth, would you examine Defendant's Exhibit J for identification and briefly identify it or describe it.

A. It is a file from our Chicago Bureau, from a correspondent in the Bureau named Dudley Doust, that was filed on February 22nd, 1961.

[355] "Mr. Kaveny: Q. Mrs. Booth, when you say 'filed,' will you elaborate. What do you mean by 'filed'?

A. A file is a correspondent's report that comes from a Bureau. It can either be sent in from the Bureau gratuitously or requested by New York."

Mr. Reuben: Page 24.

By Mr. Reuben: (Continuing reading:) "Q. Mrs. Booth, I hand you Defendant's Exhibit K for identification and ask you to briefly describe that.

A. This is a file from the Washington Bureau, from a reporter named Burt Meyers, sent in on February 22, 1961.

Q. By 'sent in,' you mean to the TIME's central office in New York?

A. Correct.

Q. Will you briefly describe Defendant's Exhibit L for identification.

A. This is a suggested story from the Chicago Bureau sent in by Correspondent Dudley Doust, on February 21, 1960.

[356] Q. You can state the heading on each one.

A. The heading on this one is 'Terror on Trumbull Street.'

Q. Would you state what the heading or caption is on Defendant's Exhibit J.

A. 'A Kicked-In Door.'

Q. And on Defendant's Exhibit K, what was the heading or caption?

A. 'Supreme Court.'

Q. And on Defendant's Exhibit I, what were the headlines and sub-headlines and by-line?

A. The top headline is 'The Suit Against the Chicago Cops.'

'A Father Recalls His Night of Terror.'

Q. And the by-line?

A. Fletcher Martin.

Q. Now, I hand you Defendant's Exhibit M for identification and ask you to state the headline or rather the caption of the portion dealing with James Monroe and Pape.

A. A suggestion from the Washington Bureau staff. The one headline is 'The Supreme Court'. The second headline is 'Another Monroe Doctrine'.

[357] Q. And by a suggestion, you mean a suggested story?

A. That is correct.

Q. From the Washington office?

A. That is correct.

Q. State the date on Defendant's Exhibit M.

A. February 20, 1941.

Q. I show you Defendant's Exhibit N for identification and ask you to describe it.

A. It is a file from the Chicago Bureau, from a correspondent named Heinke. The heading is 'Chicago Cop.'

Q. And the date?

A. The date is May 24, 1951.

Q. Will you do the same now for Defendant's Exhibit Q for identification.

A. This is not clearly labeled as to the newspaper.

Q. It is a newspaper clipping?

A. It is a newspaper clipping from December 21, 1947.

Q. What is the headline?

A. The headline is, 'This Dead Eye Dick Poison to Hoodlums.'

[358] Q. Finally, I hand you Defendant's Exhibit P, and ask you to describe it briefly.

A. 'New York Times' story headed, 'High Court Backs Suing of Police'. Written by Anthony Lewis, who is the 'New York Times' Supreme Court reporter, dated February 21, 1961.

Q. We have now introduced and identified a total of eight exhibits, being documents or items from the defendant, TIME, INC., morgue or reference file; is that correct?

A. That is correct.

Q. You stated previously that in the course of your researching the factual accuracy of the 'TIME' article of November 24, 1961, dealing with 'Justice', that you called for and obtained certain materials from the morgue or reference files; is that correct?

A. That is correct.

Q. I will ask you if Defendant's Exhibits I through and including P for identification, are the items or materials that you referred to.

A. That is correct.

Q. Do you recall whether this consists of all the items or materials that you examined in the course [359] of your research, I mean from the 'TIME' morgue file?

A. To the best of my recollection, yes.

Q. You also, of course, testified that you examined the 'Justice' report itself, Volume V, of the 1961 report of the Commission on Civil Rights.

A. Yes.

Q. Would you tell us which you examined first in time sequence?

A. I examined the United States Commission on Civil Rights report first.

Q. Then after you had received the draft of Mr. Magnuson's story you then referred to the additional materials from the 'TIME' morgue that we have identified?

A. That is right.

Q. Now then, Mrs. Booth, you were asked previously if you referred to Pages 20 and 21 of the 'Justice' report, Volume V, in the course of your researching the article.

I will ask you if you examined any other parts of the 'Justice' report in the course of your research."

[360] Mr. Reuben: The answer, I think, is on Page 29.

Mr. Kaveny: Your Honor, again there is an objection at that point and the reason for it is stated.

I beg your pardon. No, there is an objection at that point, sir.

The Court: I read that before, and I do not quite get the context of the objection with the answer that occurs, that comes thereafter, Mr. Kaveny, as to what I am to rule on here.

Mr. Kaveny: I withdraw the objection, your Honor.

The Court: All right.

Mr. Reuben: We are at Line 14 on Page 29:

By the Witness: (Continuing reading:) "A. I examined, as previously stated, Pages 1 through 113, most likely I examined—

Q. What particular parts did you examine in the course of your research?

A. I examined the foreword of the report which gives the purpose of the Commission, which is to collect, [361] study and appraise information relating to civil rights.

Q. Continue, Mrs. Booth.

A. And appraise information relating to civil rights throughout the country. To make appropriate recommendations to the press and Congress for corrective action.

And the Supreme Court has described the Commission's statutory duties in this way. Its function is purely investigative and fact-finding. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative and executive action.

I examined the Commission's membership which consists of the President of Michigan State University, head of Southwestern Legal Center.

Q. Will you give the names of these individuals?

A. John A. Hannah, Chairman, President of Michigan State University; Robert G. Storey, Vice-Chairman, head of Southwestern Legal Center and former dean of [362] Southern Methodist University Law School; Doyle E. Carlton, former Governor of Florida; Rev. Theodore M. Hesburgh, President of the University of Notre Dame, and George M. Johnson, Professor of Law and former dean of Howard University, School of Law.

I examined the introduction which says that in 1961—

The Court: Is there an objection?

Mr. Kaveny: I am sorry, sir. I lost my place.

The Court: All right, proceed.

By the Witness: (Continuing reading:) "A. (Continuing) I examined the introduction which says that in 1961 this Commission must report that police brutality is still a serious problem throughout the United States.

I examined the sub-headings, 'Unlawful Police Violence'; 'Patterns of Police Brutality', and the heading that deals with Monroe vs. Pape called 'Search, Seizure and Violence.'

Q. Is that all of the heading?

Q. Chicago, 1958?

[363] A. Yes, 1958.

And finally, I examined the end of the report where the Commission recommends a number of legislative remedies for police brutality.

Q. Do you recall whether you examined the beginning of the chapter called 'Unlawful Police Violence'?

A. I did.

Q. Would you tell us what you found there?"

Mr. Kaveny: There is an objection there, your Honor.

The Court: She may answer.

By the witness: (Continuing reading:) "A. The Commission has said that the allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others by sworn testimony, affidavits from eyewitnesses or by staff field investigations."

Mr. Reuben: Page 33.

By Mr. Reuben: (Continuing reading:) "Q. You stated that first of all in the course of your research [364] you read the official report called 'Justice' and you have just described the particular portion of it that you examined in researching the accuracy of the article.

I am asking you whether or not you recall, today, whether in your position and job as a researcher you determined that it was factually accurate."

Mr. Kaveny: There is an objection, your Honor.

The Court: The objection is overruled.

By the Witness: (Continuing reading:) "A. Since it was an official United States body called the United States Commission on Civil Rights, appointed by Congress to report to Congress and the President, we decided that it was factually accurate.

Q. You mean you decided?

A. I did, yes.

Q. After your examination and comparison of the 'Justice' report with the 'TIME' article, then what else did you refer to or examine?

[365] A. After examining the United States Commission on Civil Rights report, I examined all the material

that was available in the editorial reference files, which I believe are now before you as exhibits.

Q. These are Defendant's Exhibits I through P which you have previously examined and described in this deposition?

A. That is correct.

Q. I will ask you in your job or your function as a researcher of the 'TIME' article whether you considered your job as a researcher of the 'TIME' article fulfilled by the additional examination of Defendant's Exhibits I through P.

A. Absolutely.

Mr. Kaveny: There is an objection, your Honor. I move to strike the answer.

The Court: It may stand.

By Mr. Reuben: (Continuing reading:) "Q. I take it, Mrs. Booth, your answer is 'absolutely,' is that right?

A. Yes."

Mr. Reuben: I have nothing further in the deposition [366] to read, sir.

The Court: All right. Mr. Kaveny, do you have anything?

Mr. Kaveny: May I have a moment, sir?

The Court: You may.

(There was a short interruption, after which the following further proceedings were had herein, in open court, in the presence and hearing of the jury:)

Mr. Kaveny: Miss Witness, would you turn that deposition to Page 36. At Line 23 is the question, which I will read to you:

By Mr. Kaveny: (Reading:) "Q. In connection with your research and examination you examined, I presume,

Defendant's Exhibit No. K, which is a 'New York Post' article appearing on Monday, February 27th—"

Mr. Reuben: That is "I", Mr. Kaveny.

Mr. Kaveny: "I"?

Mr. Reuben: Yes.

[367] By Mr. Kaveny: (Continuing reading:) "Q. In connection with your research and examination you examined, I presume, Defendant's Exhibit No. I, which is a 'New York Post' article appearing on Monday, February 27th?

A. I did.

Q. Mrs. Booth, I show you Defendant's Exhibit I—"

The Court: Is it I or K?

Mr. Reuben: That is K. That is what I have down here.

The Court: All right.

By Mr. Kaveny: (Continuing reading:) "Q. Mrs. Booth, I show you Defendant's Exhibit K for identification, and I will particularly call your attention to the last page thereof, which I believe is Page 5, and I am referring now to the very last line which begins with the word 'but'.

A. Yes."

Mr. Kaveny: If you will go down to the bottom of the page, Line 23:

By Mr. Kaveny: (Continuing reading:) "Q. Would you read that last line, please.

[368] A. Starting with 'but'?

Q. Yes.

A. 'But ignore the AP story which was screwed up in the version I saw.'

Q. And 'AP' means what?

A. Associated Press.

Q. Do you have in your morgue file the AP story that is referred to there?

A. We do not.

Q. Did you take any action to determine what this AP story they are referring to here was?

A. I honestly do not recollect."

Mr. Kaveny: No further questions.

Mr. Reuben: You are excused to go back to work.

The Court: All right; thank you.

(Witness excused.)

Mr. Reuben: Your Honor, I would now like to read two exhibits to the jury. Both are in evidence and both were identified by Karen Booth. They are Defendant's Exhibits I and J.

The Court: Do you have any objection?

Mr. Kaveny: My standing objection, of course, [369] your Honor, but over and above that I understood that there would be a caution given to the jury before these were read.

The Court: That caution will be given to the jury at this time.

Counsel for the defendant is going to read certain articles. The reading of these articles does not vouch for their truth or accuracy except that they are publications that appeared in the respective newspapers. I believe they are both news articles, Mr. Reuben?

Mr. Reuben: One is a TIME story that was unpublished.

The Court: Unpublished, yes. With that admonition, counsel may proceed to read the two articles.

Mr. Reuben: Both of these came from the morgue file that Karen Booth testified about. The first one is a New York Post article, Monday, February 27th, 1961. There is a head, "The Suit Against the Chicago Cops", and another headline, "A Father Recalls his Night of Terror," by Fletcher Martin, special Post correspondent.

[370] "Chicago, February 27. The U. S. Supreme Court

ruled a week ago today that James Monroe, a Negro carpenter and contractor, could sue thirteen white policemen for abusing him and his family during an investigation of the murder of a white tavern owner here. It was a crime for which the wife of the murder victim and her white lover were eventually convicted, but "Monroe and his family disappeared from their old apartment after he filed a $200,000 damage suit against Police Captain Frank Pape and the twelve other policemen who invaded his home on October 29th, 1958. The Post finally located Monroe yesterday in the third home he has established in his flight from possible police reprisals. And here in his own words is his recollection of what happened that horror-wracked night in October, 1958."

The story now follows:

(Reading:) " 'Have you ever been in bed sleeping hard with nothing on but a flimsy T-shirt and have [371] a white policeman wake you up by sticking guns in your chin? Then have them parade you in front of your family? And you as naked as a jaybird? Well, that's what happened that night when Captain Frank Pape and his cops invaded my house. They treated us, my wife, and my kids as if we were dogs. Can you imagine how it is to stand there and take it? Nobody knows until it happens to them. That's why I hate him, and I will hate him on to the next world.

" 'I had been in a tavern where I was doing some carpenter work for the owner. Some more fellows and I were sitting at the bar drinking beer and talking about hunting dogs. After a while I went on home, washed up and went to bed. The only thing I know after I went to bed was about six o'clock the next

morning, I heard my son Robert calling me and saying somebody had broken into the house. Even then it was hard for me to wake [372] up. I was lying on my stomach. We were sleeping under two blankets, my wife and I. All I had on was a white T-shirt. My wife didn't have a stitch on.

" 'I saw three men at the foot of the bed with those flashlights with the big head. There were no other lights on. They had their guns drawn. "Get up, you black son of a bitch," one of the men said. I tried to pull the blanket up because I had nothing on under the T-shirt. They said, "Drop the blanket or die."

" 'Pape moved around and stuck me under the chin with his gun. He told me to get into the front room or get shot in the head. The other two policemen stayed in the bedroom with my wife. In the front room six or eight policemen were waiting for us. It looked like an army of cops to me because I was half asleep. One of them was a little fellow. [373] He walked over to me and told me not to open my mouth. He stuck his gun under my right jaw and held it there. He said, "Nigger, you're supposed to be bad. You ain't bad."

(Monroe had been arrested three times as a juvenile for passing a stolen check, for car theft and for robbery. At 36 he had not been in trouble again for twelve years.)

" 'Pape went back into the bedroom and he started hollering at my wife. Then I started cursing the policemen. The little cop told me to shut up. I said I would if he got that freak out of the room where my wife was. Then my baby came running in the room, screaming and hollering. He's James, Jr., and only seven now. One of the men in the room stuck his foot out and tried to trip the baby. When my son

jumped over his foot, he kicked the baby. I begged the policemen to let me hold on [374] to the baby, that if I held him he would surely stop crying. I told the cop who kicked him that he was a real bad man. That the kid was only four years old and he was trying to hurt him. Then one of the cops put his gun behind his back because he was so ashamed. They let me hold the baby.

"'Then they jerked my baby out of my arms and put him on the floor. He started crying again. I told them if they put their guns down I would whip them all. By that time I heard them beating my other kids. They even hit my daughter. I heard all the noise of the kids screaming.

"'One of the men got my wife out of bed. Then Pape came into the front room and started jamming his flashlight in my stomach. He said, "You ain't so bad, nigger." He didn't act like a human being the way he was treating us. I begged him to quit. Then I called him every word I know directly to [375] his face. I thought I could direct his attention to me. In this way he would leave my family alone. But it didn't stop nothing. He brought Houston and Robert, my sons, into the front room. All the time he hadn't brought me anything to put on. When my children were in the front room I asked him for something to put around me. He ignored me and told the boys to get up against the wall.

"'All this time he didn't say what they wanted with us . . . I had no idea what they were doing in my house. He didn't show me a warrant and he didn't even show his badge. All the children saw me with my clothes off. My wife finally got me a pair of pants. They told me I could put them on after they searched them.

"'In the back I heard my other kids hollering. I called them (cops) the lowest things that could [376] come to a man's mouth. Pape made the two boys leave the front room. He said, "Let's get this over with."

"'The little cop who kept his gun under my right jaw said, "This is it." My wife cried, "You're going to kill my husband," and Pape said, "Get that bitch out of here."

"'My daughter Jacquiline said she was going outside and call the police. One of the men slapped her and said she wasn't going anywhere. We didn't know they were policemen.

"'When they knocked on the door my son Robert said when he opened the door they pushed him out of the way. He said one of the men kicked him. That's when he called me.

"'They tore up our furniture saying they were hunting for something. I never learned what they were hunting for. Finally they said they were going to lock me up. They let me get a few more clothes, [377] then took me downstairs and shoved me in a police car.

"'In the car Pape kept telling me about how bad my children were to curse him like that. He said white children, his children, wouldn't have done that. He said his children would have been too intelligent to do that. When Pape got through talking I told him his children would be cowards if they didn't speak up for their parents.

"'Before we got where we were going, I was transferred to another car. Pape told me, though, that I shouldn't feel badly about what the policemen had done at my house. He said, "I'm only doing a job the best I know how. If I have been wrong, I'm just doing a job. If I have been wrong, sue me."

"'At police Headquarters down at 11th and State they handcuffed me and put me in a cell. Later they had me in a lineup. They told me to stay in front of some people there, "Go on upstairs. I don't want to hurt him." They kept me locked up [378] for about ten hours. Then they came to me and said if I would inform on anybody doing anything wrong in my neighborhood they would turn me loose. Anything I had to report, they said, I could get in touch with them through a certain police informant. Then in about ten minutes they drove me home.

"'When the policemen took me from home one of my children took the license plate numbers on their cars. Frank Pape said loud enough for me to hear him: If it's the last thing I do, I'm going to kill them two black niggers."

"'You see, I can never forgive a man like that. If he had left me and my children and my wife alone, this wouldn't have been in the Supreme Court or any other court. But he hurt my children. And what they did any children would do.

"'I was born in Clarksdale, Mississippi. My wife [379] was born in Birmingham, Alabama. But all this happened to us in Chicago, Illinois.'"

This is a filed story, your Honor, that was in the file. It is Defendant's Exhibit J. It is to the TIME Bureau in New York City, and it is from Doust. It was testified that it was a TIME report. It is entitled, "A Kicked-In Door", (Take 1.)

(Reading:) "It was 5:45 on the gray morning of October 29, 1958, and dawn dissolved over South Trumbull Avenue in a slummy, muddy, neighborhood on Chicago's West Side. In his neat five and one-half room, $90 a month basement apartment at No. 1424, a lanky 30-year-old Negro plasterer and carpenter

named James Ezekiel Monroe, a proud man who had gone straight since his delinquent childhood, lay asleep with his wife in their bedroom. Their young son and five other children by their first marriage slept in two other bedrooms. Robert, 16, [380] at the time, was the first to come awake. A light sleeper, partly because he shared an iron bed with his 17-year-old brother Houston, rolled over, gummy with slumber, to see men moving in trenchcoats outside his window. Then abruptly there was thunder at the kitchen door. It shuddered under the rain of a fist that rattled its window.

"Robert got up, thinking vaguely it was the janitor, who frequently came to the back door to get the key for the boiler room. He went to the kitchen, pulled on the light saw nothing but his reflection in the kitchen door window. 'Open the door,' was the hard demand he recalls hearing, 'Open up.'

"Robert turned the key in the door and several men tumbled in. He doesn't remember the number, for just then down the hall a front door exploded its square bolt lock and crashed open. For his troubles, [381] Robert caught the butt of a .38 on his right temple and was knocked to the floor. A man stood over him.

"'I looked up and I was facing a .38,' he remembers. For himself, James Monroe was struggling from his sleep. He lay on his stomach under a red blanket, the feet of his six-foot-six-inch frame poking from the end of their Hollywood style bed. 'Get up, you black (obsenity); you dead!' a voice commanded him.

"He rolled over, snatching the blankets to his privates, and looked into the blinding lances of the three flashlight beams. 'Get up.'

"Naked, except for a T-shirt, Monroe got up, hold-

ing the red blanket around him. He saw the men in trenchcoats. Then he saw their .32 snubnosed revolvers, 'I seen the flashlights, but when I seen the guns, I got scared', he says. One of the men [382] commanded: 'Drop that blanket or you're dead'. He dropped the blanket. Monroe, stunned and unaware that these night raiders were Chicago policemen, was steered into the front room, a pistol thrust up under his chin, he stood there in the cold, naked, goose-pimpled from fear and the chill, with this pistol shoved into his throat, and two others--held by two more of Chicago's finest,—pressed up above his mastoids. Two other guns were trained on him from across the room.

"Back in the master bedroom a cop directed 33-year-old Flossie Monroe to 'get her black ass out of bed'. She refused and lay there under a green blanket as the cop and another ransacked her closet and five dresser drawers. The produced no search warrant, didn't even announce that they were police. Out came the clothes onto the linoleum floor, out came the shoes [383] and shirts and purses. Looking for Marshall Field labels on the shirts, the police took more time there.

"Then Flossie was snatched out of her bed, naked except for the blanket she drew around her, and the mattress was torn open. Mattresses were torn open on the bedroom of Jacqueline, 14, and four-year-old Jimmy (who slept together), and in the boys' back room where Robert and Houston doubled up as well as their brothers, 12-year-old Ralph and 10-year-old Lawrence.

"In the front room James Monroe was cursing the police,—although he still didn't know they were police, —and demanding that they 'get that freak out of my wife's bedroom.'

"The freak and his friend came out of the room along with Mrs. Monroe. Jacqueline, told by her mother to leave the house and call the police to see who these men were, was knocked down by one of the cops as she entered the kitchen. Robert and Houston [384] were both knocked down in their bedroom as well. Once Robert was told to get his black ass back in the bedroom. Once he was told to, 'shut your Goddamn mouth or I'll blow your brains out.' He shut his mouth and kept his brains.

"The little boy Jimmy once was tripped when he ran into the front room, kicked. Once when the family seemed clustered in the front room, James was directed to 'get those black bastards out of here'.

"The children harassed the police, and at the end when James Monroe was being led from the house out the back door, the two oldest ran out to look at the cars and noticed the license numbers. As the chief of the group of policemen, Frank Pape, then Deputy Chief of Detectives, a stocky cop known for his roughness with prisoners and his short temper, turned to the children, he spoke to James Monroe and said of [385] his stepsons, 'If it's the last thing in my life, I'll kill those (obscenities).'

"Monroe was taken to the corner of Roosevelt Road and Homan Avenue, where he was put into another car. Frank Pape left at this point, Monroe knowing they were police but not knowing why he was being picked up. As Pape left the car he said, 'If you think I did wrong, sue me.'

"Monroe was taken to the Central Police Headquarters at 11th and State and put in a cell. He was denied a phone call and was held for ten hours without charge. There were four magistrates on duty in the building at the time, 16 on duty in various branches

of the Municipal Court around the city. Monroe was not brought before a judge, never charged with a crime, not allowed to post bond or make bail because no bail was set, not permitted to contact an attorney, family or friend, not informed of any formal charges, [386] not informed of his privileges against self-incrimination, not informed fo his right for legal advice.

"Monroe was part of a round-up for the murder of Peter Saisi, who two days before was shot to death in the basement of his North Side home. Saisi's wife, May, who had put the police on Monroe's trail by identifying him from a police picture, yet never fingered him after viewing him in a police lineup the day he was taken in, later confessed her part in the killing. Her lover, Richard Lansing, confessed. Both are serving prison terms.

"Here is why Monroe is suing. 'I wouldn't have gone down and seen about suing if that man hadn't promised to kill my sons.' Monroe had his view of the ways of police,—especially Chicago police,—and in his craw he remembers seeing a drunk Negro in the hands of cops. They dragged him down a flight [387] of stairs, broke his neck. This happened during Monroe's childhood. He adds: 'This'll make the fight easier in the south. They won't have to fight it quite as long now'.

"All of the material in Tuesday's New York Times is accurate. Some of this file,—especially the crispness of the language,—was told us today and is not included in the original complaint."

The defendant, your Honor, rests.

The Court: All right. Do you desire a short recess, Mr. Kaveny?

Mr. Kaveny: Yes, I would, your Honor.

The Court: All right. We will take a five-minute recess.

Wednesday, January 15, 1969,
3:30 o'clock p.m.

Met pursuant to recess.

The Clerk: Case on trial.

The Court: Does the plaintiff have any rebuttal?

Mr. Kaveny: Yes, your Honor.

The Court: All right; you may proceed.

Mr. Kaveny: Will the plaintiff take the stand.

FRANK W. PAPE, called as a witness in rebuttal, in his own behalf, having been previously duly sworn, resumed the stand and testified as follows:

Direct Examination by Mr. Kaveny.

Q. Captain Pape, did you have occasion to examine the article in the New York Post which Mr. Reuben read to the jury a moment ago?

A. Yes, I did.

Q. Did you have occasion, sir, to determine the identity of Fletcher Martin?

A. Yes, I have.

Q. Do you know where Mr. Martin lived in February [390] of 1961?

A. He lived somewhere in the area of 49th and Calumet Avenue in the City of Chicago or 49th and Drexel, somewhere in that area.

Q. Do you know by whom he was employed?

A. He was employed by the Sun-Times here in the city of Chicago as a free-lance reporter.

Q. Do you know what his race was?

A. He was a colored gentleman.

Mr. Reuben: Your Honor, may I approach the side bar?

The Court: Yes.

(There was a side bar discussion, outside the hearing of the jury, which was not reported, after which the following further proceedings were had in the presence and hearing of the jury, to-wit:)

The Court: Ladies and gentlemen of the jury, we call these side bar conferences, and it eliminates objections in open court or having to send you to the jury room while I hear the argument of counsel. It is not that we are trying to keep any secret from you. [391] They inform me what they are going to offer in advance, so that it is a courtesy of counsel to the Court and to the jury that we have these discussions.

You may proceed, Mr. Kaveny.

By Mr. Kaveny: Q. Captain Pape, during your some thirty-odd years with the Police Department, have you maintained a scrap book or clipping file of your own on yourself?

A. Yes; I have eleven of them.

Q. You have eleven scrap books?

A. Approximately.

Q. What is contained in these scrap books?

Mr. Reuben: At this point I will object, your Honor.

The Court: The objection is sustained as not pertaining to the record.

Mr. Kaveny: May I make an inquiry?

The Court: Yes.

Mr. Kaveny: May I suggest to him the contents of the file?

The Court: You mean of the clip book?

Mr. Kaveny: That is right, sir, the nature of the clippings.

[392] The Court: I will allow that to go into the record.

Mr. Kaveny: All right; fine.

[393] By Mr. Kaveny: Q. Are these clippings that you have primarily newspaper clippings?

A. Yes, they are.

Q. Are they from Chicago newspapers?

Mr. Reuben: I think—

The Court: I will allow that much.

By the Witness: A. Yes, they are.

By Mr. Kaveny: Q. Do you have any clippings from national magazines?

A. Yes, I do; stories, not clippings.

Q. Are these of and concerning yourself?

A. That's correct.

Q. Have they been published in newspapers and magazines during the last ten years—pardon me.

I meant to say from the period of 1950 to 1965.

A. Some of them are published earlier than that.

Q. Are there those published from 1950 to 1965?

A. Yes.

[394] Q. In those eleven scrapbooks?

A. Approximately eleven scrapbooks and these other periodicals.

Mr. Kaveny: Your Honor, on this particular matter I would like to make an offer of proof. May we preserve that?

The Court: We will make that outside of the presence of the jury. As I indicated in the conference at sidebar, as to any further interrogation I will sustain objections as to what the articles were. You may make an offer of proof as to that.

Mr. Kaveny: Yes, sir.

The Court: That will be outside the presence of the jury.

Mr. Kaveny: Yes, sir. Thank you.

By Mr. Kaveny: Q. Captain Pape, did you have occasion to inquire of the Chicago Police Department into the criminal record of James Monroe?

A. Yes, I did.

Q. As a result of that did you determine whether or not Mr. Monroe had ever been convicted of a crime?

[395] A. Yes, I have.

Q. Do you know when his last conviction was?

A. Well, I would have to have the record to refresh my memory.

Q. Was it in March of 1947?

Mr. Reuben: I must object. In the first place, I am not sure this is rebuttal, and certainly the record is the best evidence.

The Court: You are basing your objection on the fact that the record is the best evidence; is that the basis of your objection?

Mr. Reuben: Yes, sir.

The Court: The best evidence is the record. Do you have the record here?

Mr. Kaveny: Yes, sir.

The Court: You may have it marked for identification.

Mr. Kaveny: Would you please mark this as Plaintiff's Exhibit No. 1 for identification.

(Said exhibit was marked as Plaintiff's Exhibit 1 for identification.)

By Mr. Kaveny: Q. Captain Pape, I show you what has been marked as Plaintiff's Exhibit No. 1 for [396] identification. Would you identify that for the Court and jury.

A. This is a document, an official document of the Chicago Police Department, which disclose the background of the individual who is named on this record, the criminal background, that is.

Q. Would you read that record for us, sir?

Mr. Reuben: I think I have to object. As I understand it, the proper way is to offer it into evidence before you read it to a jury.

The Court: The objection is sustained.

Mr. Kaveny: I beg your pardon, your Honor. I will withdraw it.

By Mr. Kaveny: Q. Captain Pape, how did that come into your possession?

A. Well, this record was part of the exhibits given to me along with the picture of Monroe in October of 1958, but this is a duplicate of that record.

[397] Q. Have you examined the record now, sir?

A. I have.

Q. Put the record down, please.

A. Sir?

Q. Would you put the record down, please.

Without reference to the record, and this is a question, sir, can you tell me where James Monroe was last convicted of a crime?

A. 1947, I believe.

Q. What was the charge?

A. Armed robbery.

Q. What was the sentence?

A. Two to five years in the Illinois State Penitentiary.

Q. When did he complete that sentence?

A. I believe two years after that date, sometime in about '47 or '48. I am not certain.

Q. Captain Pape, do you know whether or not Mr. Monroe was ever convicted of a crime prior to 1947?

A. Yes.

Q. Do you know when before that?

A. Much earlier than that. I'd like to—

Q. All right; take a look at the record.

[398] A. Do you want me to go from the start to the finish?

Q. No, sir. My question was: Do you know whether he was convicted of a crime prior to that time?

A. Yes, he was.

Q. When, sir?

Mr. Reuben: Your Honor, he is reading from a document under the guise of refreshing his recollection, and I do not think it is quite fair.

The Court: Have the document offered.

Mr. Kaveny: All right, your Honor. I will offer the document itself into evidence, your Honor, as Plaintiff's Exhibit No. 1.

The Court: Is there any objection?

Mr. Reuben: Mr. Kaveny has never shown it to me.

(There was a short interruption, after which the following further proceedings were had in open court, in the presence and hearing of the jury, to-wit:)

Mr. Reuben: I have no objection.

The Court: All right. It may be admitted into [399] evidence as Plaintiff's Exhibit No. 1, is that correct?

Mr. Kaveny: Yes, sir.

(The said document, so offered and received in evidence, was marked Plaintiff's Exhibit No. 1.)

By Mr. Kaveny: Q. Captain, would you read the document for us, please.

A. This is a file of the Chicago Police Department, what is considered a file—

Q. Just read it, please.

The Court: Just read the document.

By the Witness: A. "James Monroe, FBI No. 3974079.

"March 25, 1944, National Training School for Boys, Washington, D. C., one year and one day, mail theft from Chicago, Illinois.

"March 2, 1945, St. Charles, Illinois Training School for Boys until March 21, carrying concealed weapons.

"March 3, 1947, sent to the Joliet, Illinois Penitentiary No. 24979, robbery, two to four years, fined,

[400] armed, Judge Ward, Officers Maher and Selky, 22nd District.

"Transferred, May 16, 1947, to State Penitentiary from Pontiac Penitentiary, Illinois, No. 16413, discharged May 20, 1950, expiration of sentence.

"April 20, 1951, investigation, Officer Grace and company, 22nd District.

"March 11, 1955, picked up by Officers Halley and Hanahan, 25th District.

"October 29, 1958, investigation, Officer Deputy Chief Pape, Detective Bureau."

[401] Q. When you arrested James Monroe on the morning of October 29, 1958 was he wearing "nothing on but a flimsly T-shirt"?

A. No, sir.

Q. Did you or any other policemen in your command wake him up by sticking a gun under his chin?

A. No, sir.

Q. Did you or any of your officers have him parade in front of his family as naked as a jay bird?

A. No, sir.

Q. Did you have him parade in front of his family naked?

A. No, sir.

Q. Did you or any of your officers treat either Mr. Monroe, his wife or his children as if they were dogs?

A. No, sir.

Q. Did you or any of your police officers break down any doors to gain entrance into the house?

A. No, sir.

Q. Did Mrs. Monroe have some form of clothing on when you came into her room?

A. Yes, sir.

Q. Did three police officers go into the Monroe [402] bedroom and stand at the foot of the bed?

A. No, sir.

Q. Did three police officers enter the Monroe bedroom to wake them up?

A. No, sir.

Q. At any time were three police officers in that bedroom while James Monroe and his wife were in the bedroom?

A. Not to my knowledge.

Q. To your knowledge was anyone in that bedroom while they were in that bedroom besides yourself and Officer Jerry Sullivan?

A. No, sir.

Q. Did you or any of your police officers possess a flashlight with a big head?

A. The only light was the one I had, and I described it here to the jury.

Q. Were there lights on in the apartment?

A. Yes, sir.

Q. Did any of your officers have their guns drawn?

A. I don't recall. I did not have my gun drawn.

Q. Did Sergeant Jerry Sullivan have his gun drawn?

[403] A. I can't speak for him. I don't know.

Q. Did you or any officer under your command, addressing Mr. Monroe say: "Get up, you black son-of-a-bitch."

A. No, sir.

Q. Did Mr. Monroe try to pull the blanket up because he had nothing on under the T-shirt?

A. Not to my knowledge.

Q. Did you or any police officer in your command addressing Mr. and Mrs. Monroe or any other member of the family say, "Drop the blanket or die."

A. No, sir.

Q. Did you move around and strike Mr. Monroe under the chin with your gun?

A. No, sir.

Q. Did you, in addressing Mr. Monroe, tell him to get into the front room or get shot in the head?

A. No, sir.

Q. Did two other policemen at that time stay in the bedroom with his wife?

A. Not to my knowledge.

Q. When Mr. Monroe was taken into the front room of the apartment, were there six or eight policemen waiting for [404] him?

A. No, sir.

Q. Did you observe any police officer walk over to Mr. Monroe and tell him not to open his mouth?

A. Not to my knowledge.

Q. Did you observe any police officer or did you yourself stick a gun under his jaw and hold it there?

A. No, sir.

Q. Did any police officer, holding a gun under Mr. Monroe's jaw say to him: "Nigger, you supposed to be bad. You ain't bad."

A. No, sir.

Q. Did you go into the bedroom and start hollering at Mr. Monroe's wife?

A. No, sir.

Q. Did you hear some police officer tell Mr. Monroe to shut up?

A. No, sir.

Q. Did you hear Mr. Monroe say that he wanted to get that freak out of the room where his wife was?

A. No, sir.

[405] Q. Did you observe a baby come running into the room screaming and hollering?

A. There was a small child there running around the apartment.

Q. Screaming and hollering?

A. No, sir.

Q. Would that be a five-year-old child?

A. Well, to the best of my recollection the child might have been around three or four. I'm not certain.

[406] Q. Did you observe one of the police officers in the room stick out his foot and attempt to trip the baby?

A. No to my knowledge.

Q. Did you then observe that same police officer or some other officer, when the child jumped over his foot, attempt to kick the baby?

A. No, sir.

Q. Did you observe any conduct by any one of your police officers in any fashion resembling the last described act?

A. Absolutely not.

Q. Did you hear Mr. Monroe beg any police officer, yourself, included, to hold his baby?

A. No, sir. He was holding his child.

Q. Did you hear Mr. Monroe tell the police officer that he was real bad, that he was a real bad man for kicking his son?

A. No, sir.

Q. Did you observe one of the police officers put his gun behind his back because he was so ashamed?

A. No, sir.

Q. Incidentally, Captain Pape, you at no time observed any gun in evidence—

[407] A. No.

Q. —is that true?

A. I never drew my gun.

Q. Did you observe any other police officer holding his gun?

A. No.

Q. Did you observe any police officer or did you yourself jerk the baby out of Mr. Monroe's arms and put him on the floor?

A. No, sir.

Q. (Continuing) So that he started crying?

A. Not in my presence, that never happened.

Q. Did Mr. Monroe state to any police officer, "I told them if they put their guns down I would whip them all"?

A. No, sir.

Q. Mr. Monroe goes on to state, or this newspaper article, I should say, goes on to state, quoting Mr. Monroe: "by that time I heard them beating my other kids. They even hit my daughter."

Did you hear or observe any such conduct on the part of any of your police officers?

A. No, sir.

Q. Did you participate in any such conduct?

[408] A. No, sir.

Q. Mr. Monroe goes on to say, "I heard all the noise of the kids screaming."

Did you hear any such noise?

A. The kids were making plenty of noise. That's true.

Q. He continues: "One of the men got my wife out of bed."

Did you observe any police officer ordering Mrs. Monroe out of bed?

A. No, sir.

Q. Did Mrs. Monroe get out of her own volition?

A. She sure did.

Q. Mr. Monroe continues, or the newspaper article, I should say, continues, quoting Mr. Monroe: "Then Pape came into the front room and started jamming his flashlight in my stomach. He said: 'You ain't so bad, nigger.'"

Captain, I ask you, does that describe any action of you on that day?

A. None whatsoever.

Q. Did you make that statement to the gentleman?

A. No, sir.

[409] Q. Mr. Monroe goes on to say, or the newspaper article goes on to say, I should say: "He didn't act like a human being, the way he was treating us."

Did you consider yourself to be conducting yourself as a human being?

A. Well, I did up until after reading that or hearing that kind of information.

Q. Did Mr. Monroe at that point say to you: "I begged him to quit"?

A. No, sir.

Q. Mr. Monroe continues: "Then I called him every word I know, directly to his face."

Did he do that to you?

A. No, sir. I had no problem with Mr. Monroe whatsoever.

[410] Q. He goes on to say: "I thought I could direct his attention to me. In this way he would leave my family alone. But it didn't stop nothing."

Was there any cause or reason why he should direct your attention away from his family?

A. No problem with Mr. or Mrs. Monroe at all.

Q. Is there any reason why any conduct of your police officers would occasion him to direct his attention away to himself?

A. None whatsoever.

Q. Mr. Monroe goes on to say: "He brought Houston and Robert, my sons, into the front room."

I presume the "he" is you, but did any of the police officers bring any children into the room?

A. No, sir. The children were free to move about the apartment as was Mrs. Monroe.

Q. He goes on to say: "All the time he hadn't brought me anything to put on."

Was Mr. Monroe standing naked in the front room at any time?

[411] A. No, sir. He had a pair of dungarees on, as I described.

Q. Did his children see him standing naked against any wall?

A. No, sir.

Q. He goes on to say: "When my children were in the front room I asked him for something to put around me. He ignored me and told me to get up against the wall."

Did any of that take place, sir?

A. No, sir, that did not.

Q. Mr. Monroe was dressed?

A. Yes, he was.

Q. Did you ignore any request of Mr. Monroe that he put clothes on?

A. Mr. Monroe never made any requests. He had clothing on all the time in our presence from the time he got up out of bed.

Q. Mr. Monroe goes on, or rather the newspaper article goes on: "All this time he didn't say what they wanted with us . . . I had an idea what they were doing in my house. He didn't show me a warrant and he didn't even show his badge."

Did you tell Mr. Monroe why you were there?

[412] A. Yes, I did.

Q. When did you tell him?

A. I told him, as I related here yesterday, I believe, when he was speaking loudly and I went out to talk to him, I left the bedroom, and he complained about us being there and I said we were there because his picture had been identified in a robbery, and his reply was he was not involved in any robbery, and I told him that was why he would be taken down to the Detective Bureau, and if he was not involved he would be released.

Q. Captain, did you identify yourself as a police officer when you entered his bedroom?

A. I sure did.

Q. Did your other police officers do so?

A. Well, I wouldn't say to him that they did, but I told them we were police officers and asked them to get up out of bed.

Q. Before you entered the apartment did you show your badge?

A. I certainly did.

Q. Captain, you did not have a warrant for his arrest?

A. That's true.

[413] Q. At the time was it police procedure to obtain a warrant?

A. Warrants aren't required—

Mr. Reuben: Objection.

The Court: Objection sustained.

By Mr. Kaveny: Q. Mr. Monroe goes on to state: "All the children saw me with my clothes off. My wife finally got me a pair of pants. They told me I could put them on after they searched them."

Did the children see him with his clothes off?

A. No, sir.

Q. Did his wife get him a pair of pants finally?

A. No. Officer Sullivan gave him a pair of plants.

Q. He says: "In the back I heard my other kids hollering."

Were the children screaming?

A. They were hollering.

Q. "I called them (Cops) the lowest things that could come to a man's mouth."

Did Mr. Monroe say this?

A. No, I had no problem with Mr. Monroe whatsoever.

[414] Q. He goes on to state in the newspaper: "Pape

made the two boys leave the front room." He said: "Let's get this over with.'"

Did you require the two boys to leave the room?

A. The only reference I made to the children was to ask Mrs. Monroe if she would ask the children to remain in the rear, and whether she complied or not, I do not know.

Q. Did you use the phrase, "Let's get this over with" to anyone?

A. I don't know what that infers, number one, and I never made the remark.

Q. The newspaper article goes on to say: "The little cop who kept his gun under my right jaw said: 'This is it.' My wife cried: 'You're going to kill my husband,' and Pape said, 'Get that bitch out of here.'"

Did that transpire, sir?

A. It certainly did not.

Q. Did any part of it transpire?

A. Not any part of it.

Q. Did you say or did your men say to anyone in general: "Get that bitch out of here", referring [415] to Mrs. Monroe?

A. No reference made to Mrs. Monroe at all.

Q. What about the children?

A. Or to the children, other than my—

Q. Did you use that expression at that time at all?

A. Would you repeat it, counsel.

Q. The expression was: "Get that bitch out of here."

A. No.

Q. Did you hear Mrs. Monroe say, "You're going to kill my husband"?

A. No.

Q. Did you see a police officer put a gun under Mr. Monroe's jaw and say, "This is it"?

A. No, sir.

Q. The newspaper article goes on to say: "My daughter, Jacqueline, said she was going outside and call the police."

Did you ever hear any child say that?

A. No.

Q. "One of the men slapped her and said she wasn't going anywhere."

Did you observe this?

[416] A. She was free to go if she wished. The children were not in custody.

Q. He goes on to say, or the newspaper article goes on to say: "We didn't know they were policemen."

A. Well, they certainly knew we were policemen. We identified ourselves.

Q. The newspaper article goes on, sir: "When they knocked on the door, my son Robert said, when he opened the door, they pushed him out of the way."

Is that true, sir?

A. That's not true.

Q. The article goes on: "He said one of the men kicked him. That's when he called me."

Did you observe any police officer kick this 14-year-old boy?

A. No, that did not happen.

Q. The article goes on: "They tore up our furniture, saying they were hunting for something."

Did you observe any furniture being torn apart, sir?

A. There was no furniture torn up at all, nothing [417] torn up.

Q. It goes on: "I never learned what they were hunting for."

Did you inform Mr. Monroe what the search was for?

A. No, I wouldn't say we informed him what we were hunting for.

Q. "Finally they said they were going to lock me up."

Did you inform him of that?

A. I told Mr. Monroe we were going to take him downtown, as I related here, and the matter would be processed down there and he would be released if he was not involved, and he was released.

Q. The article goes on, sir: "They let me get a few more clothes, then took me downstairs and shoved me in a police car."

Did he obtain some more clothing?

A. Yes, he did. He asked to change his clothes from the dungaree pants with the plaster on to other clothing, and I told him that that was not necessary, and then was given a jacket because it was rather chilly.

[418] Q. The article goes on to say, sir: ". . . then took me downstairs . . ."

Is that correct?

A. No, sir.

Q. Why not, sir?

A. You would have to go upstairs. The apartment is on the first floor, and you would have to go up three or four stairs to the gangway which would lead out to the alley.

Q. Is that the way he was taken out?

A. That's the way he was taken out.

Q. He went upstairs, not downstairs?

A. That's correct, sir.

Q. Was Mr. Monroe in your presence shoved into a police car?

A. No, sir.

Q. The article goes on: "In the car, Pape kept telling me about how bad my children were to curse him like that."

Did you have such a conversation with Mr. Monroe?

A. No, not that I recall.

Q. The article goes on: "He said white children, his children, wouldn't have done that."

[419] Did you have such a conversation with Mr. Monroe?

A. No, not at all.

Q. The article goes on: "He said his children would have been too intelligent to do that."

A. Whose children?

Q. Related here in the article is a conversation you had with Mr. Monroe. According to Monroe, or according to the article quoting Monroe, who said you said: "He said," meaning you, "his children would have been too intelligent to do that."

A. No, I had no conversation of that nature with him at all.

Q. The article goes on with this conversation between you and Mr. Monroe: "When Pape got through talking, I told him his children would be cowards if they didn't speak up for their parents."

That is the end of the conversation. Did Mr. Monroe make that statement to you: "When Pape got through talking, I told him his children would be cowards if they didn't speak up for their parents"?

A. No, he did not. There was no such conversation.

[420] Q. The article goes on of the conversation between you and Mr. Monroe: "Pape told me, though, that I shouldn't feel badly about what the policemen had done at my house. He said: 'I'm only doing a job the best I know how. If I have been wrong, I'm just doing a job. If I have been wrong, sue me.' "

Did you make that statement to Mr. Monroe?

A. No, I did not.

Q. Did you make any statement substantially like that to Mr. Monroe?

A. No, I did not.

Q. Now, Captain, Mr. Monroe was placed in a police car and that is the last you saw of him?

A. The last I saw of him.

Q. Therefore, the balance of this article dealing with his treatment at the police station is not within your knowledge?

A. I never saw Mr. Monroe before I entered that apartment; I never saw him after I left it until two or three years later in the building across the street.

Q. I have here now, sir, a teletype which has been identified here as Defendant's Exhibit J, which is [421] a teletype from the Chicago to New York office of Time Magazine. The author is a gentleman by the name of Dudley Doust and it is entitled "A Kicked-In-Door."

It says: "Then, abruptly, there was thunder at the kitchen door. It shuddered under the rain of a fist that rattled its window."

Would that describe how you knocked on the door?

A. No, sir.

Q. It goes on to say that a young man heard, 'Open the door,' was the hard demand he recalls hearing. 'Open up.'" Did you use those words?

A. No, sir.

Q. What words did you use?

A. I knocked on the door in a normal fashion and identified myself.

[422] Q. How?

A. As a police officer, with my star up to the window, as I stated. A young boy had turned on the light.

Q. What did you say?

A. Asked if Monroe lived there. He said he did. He came to the door and opened it up. I asked him where Mr. Monroe was and he said in the front bedroom.

Q. This particular article goes on: "Robert turned the key in the door and several men tumbled in . . ."

Is that how you entered the apartment?

A. No, that's not so.

Q. This article goes on: "He doesn't remember the

number, for just then, down the hall, the front door exploded its square bolt lock and crashed open."

As you entered the apartment, is that what occurred at the front door?

A. The officers were admitted by Mrs. Monroe. That was testified to.

Q. No, sir. My question to you was: As you entered the back door is that what happened at the front door?

[423] A. No.

Q. Is it a fact, sir, that the front door was opened sometime thereafter by Mrs. Monroe?

A. By Mrs. Monroe; that's correct.

Q. This article goes on, talking about Robert who let you in the back door: "For his troubles, Robert caught the butt of a .38 on his right temple and was knocked to the floor. A man stood over him. Robert says, 'I looked up and I was facing a .38,' he remembers."

Did that occur as you went to the door, sir?

A. No, that did not happen.

Q. Did you see any police officer with a gun in his hand who went through the door?

A. I saw no officer with a gun in his hand.

Q. Did you see any police officer strike this 14-year-old with the butt of a .38 revolver?

A. Certainly not.

Q. Did you see this child fall to the floor as the result of such a blow?

A. No, sir.

Q. Did you see one of your police officers standing over him pointing his .38 service revolver at this [424] child?

A. No, sir.

Q. Continuing, sir, and I presume we are referring to you or Sergeant Sullivan, since you entered the bedroom, this reads: "For himself, James Monroe was struggling from his sleep. He lay on his stomach, under a red blanket,

the feet of his 6 foot 6 inch frame poking from the end of their Hollywood style bed. 'Get up, you black (obscenity). You dead?' "

Did you say that to Mr. Monroe?

A. No, sir.

Q. Did Sergeant Sullivan say that to Mr. Monroe?

A. No, sir.

Q. Did anybody say that to Mr. Monroe?

A. No, sir.

Q. Were any words anywhere similar to that said to Mr. Monroe?

A. No, sir.

Q. This article continues: ". . . snatching the blankets to his privates and looked into the binding lances of three flashlight beams."

Was Mr. Monroe uncovered?

[425] A. No, sir.

Q. Were the blinding lances of three flashlight beams shining on him and his wife?

A. I was the only one that had a flashlight that entered that bedroom.

Q. Was your flashlight shining on him?

A. I don't recall whether my light was on or someone turned the light on.

Q. Did you address Mr. Monroe by saying, "Get up"?

A. No, sir. I did ask him to get out of bed.

Q. Did you identify yourself as a police officer?

A. I did. I told him we were policemen.

Q. It reads here: "Naked except for a T shirt, Monroe got up, holding the red blanket around him."

Was Mr. Monroe wearing only a T shirt?

A. No, sir.

Q. Did he wrap a red blanket around him?

A. No, sir.

Q. He was wearing a T shirt and a pair of shorts?

A. That's correct, sir.

[426] Q. The article goes on: "He saw the men, in trench coats."

Were your police officers wearing trench coats?

A. No, sir.

Q. "Then he saw their .32 snub-nosed revolvers."

Were any guns drawn in that bedroom?

A. No guns were drawn, not to my knowledge.

Q. In quotations it says here: "I seen the flashlights. But when I seen the guns I got scared."

To your knowledge did Mr. Monroe see a gun?

A. He didn't see my gun.

Q. Did he see a gun to your knowledge, sir?

A. Not to my knowledge.

Q. He says: "One of the men commanded 'Drop that blanket, or you're dead.'"

Did you hear anyone say that to him?

A. Never heard him say that and I never saw him with a blanket.

Q. It goes on: "He dropped the blanket. Monroe, stunned and unaware these night riders were Chicago policemen, was steered into the front room . . ."

[427] Did he at that moment drop any blanket?

A. I never saw him with a blanket.

Q. You are described as night riders. Had you informed him that you were Chicago policemen?

A. Yes, I did.

Q. It says here: ". . . a pistol thrust up under his chin. He stood there in the cold, naked, goose-pimpled from fear and the chill, with this pistol shoved into his throat and two others—held by yet two more of Chicago's finest—pressed up above his mastoids. Two other guns were trained on him from across the room."

A. Never happened.

Q. Does that describe the scene in the living room or bedroom at the Monroe household?

A. Never happened.

Q. Were there two police officers with guns thrust into the mastoids?

A. No, sir.

Q. Was there a pistol shoved into his throat?

A. No, sir.

Q. Were there two other guns trained on him from across the room?

[428] A. No, sir.

Q. It reads on: "Back in the master bedroom, a cop directed 33-year-old Flossie Monroe to 'get her black ass out of bed.'"

Did you hear any police officer address Mrs. Monroe in that fashion?

A. No, sir.

Q. Did you address her in that fashion?

A. No, sir.

Q. Did you, in fact, tell her that she could remain in bed if she so chose?

A. Yes, I did.

Q. "She refused and lay there, under a green blanket . . ."

Did you see a green blanket?

A. She had blankets on her. I don't recall the color.

Q. ". . . as the cop and another ransacked her closet . . ."

Did you observe anyone ransacking her closet?

A. No. I looked in the closet, as I testified here yesterday.

Q. ". . . and five dresser drawers."

A. I don't even know if there was a dresser in [429] the room, to be very frank about it.

Q. "They produced no search warrant . . ."

That is true?

A. That's correct.

Q. ". . . didn't even announce that they were police." That is false?

A. That is incorrect.

[430] Q. Out came the clothes onto the linoleum floor, out came the shoes and shirts and purses."

Is that true, sir?

A. No, sir, not as far as I am concerned.

Q. "Looking for Marshall Field labels on the shirts . . ."

A. That part is true. We were looking for Marshall Field labels on shirts, or some such labels. I am not certain they were Marshall Field.

Q. " . . . the police took more time there." I do not understand that.

A. I don't know what that refers to.

Q. The article goes on, sir: "Then Flossie was snatched out of her bed, naked except for the blanket she drew around her . . ."

Is that true, sir?

A. I never saw the woman in the nude, but I'm assuming she got out of bed with the blanket around her.

Q. ". . . and the mattress was torn open."

A. Not so.

Q. "Mattresses were torn open in the bedroom of Jacqueline, 14, and 4-year-old Jimmy (who slept with her) and in the boys' back room . . ."

[431] Do you know anything about that, sir?

A. I know nothing about it.

Q. Were any mattreses torn open in any of the bedrooms?

A. Not to my knowledge.

Q. "In the front room, James Monroe was cursing the police—although he still didn't know they were police—and demanding that they 'get that freak out of my wife's bedroom.' "

Did you hear that conversation, sir?

A. Not at all.

Q. Do you know whether any of your officers heard such a conversation?

A. Well, I can't speak for them, but I know there was no such conversation in my presence or within my hearing.

Q. "The freak", which I presume is you, "and his friend came out of the room, along with Mrs. Monroe."

Is that true?

A. No, sir. I don't know when Mrs. Monroe left the room.

Q. "Jacqueline, told by her mother to leave the house and call the police to see who these men were, [432] was knocked down by one of the cops as she entered the kitchen."

Is that true, sir?

A. That's not true.

Q. "Robert and Houston were both knocked down in their bedroom as well."

Is that true?

A. That's not so.

Q. "Once Robert was told to: 'get his black ass back in the bedroom.' "

Is that true, sir?

A. No, sir.

Q. "Once he was told, 'to shut your goddam mouth or I'll blow your brains out.' "

Was that told to him?

A. Not so.

Q. It goes on: "The little boy, Jimmy, once was tripped when he ran into the front room . . ."

True?

A. Not so.

Q. "Kicked once." Was the child kicked?

A. Not so.

Q. "When the family seemed clustered in the front room, James was directed to 'get those black bastards[433] out of here.' "

A. Not true.

Q. "The children harassed the police . . ."

A. That's true.

Q. ". . . and at the end, when James Monroe was being led from the house out the back door, the two oldest ran out to look at the cars and noticed the license numbers."

A. That's true.

Q. "As the Chief of the Group of policemen, Frank Pape, then Deputy Chief of Detectives . . ."

True?

A. Yes, that's true.

Q. ". . . a stocky cop known for his roughness with prisoners . . ."

Is that true?

A. That's not true.

Q. ". . . and his short temper . . ."

A. Well, of course, I don't believe that's true, either.

Q. ". . . turned to the children. He spoke to James Monroe and said of his step-sons: 'If it's the last thing in my life, I'll kill those (obscenities).' "

[434] A. That isn't so.

Q. It says here: "Monroe was taken to the corner of Roosevelt Road and Homan Avenue where he was put into another car. Frank Pape left him at this point . . ."

A. That's not true.

Q. All right. You left him at the house?

A. I left him in the alley right in the rear of his home.

Q. ". . . at this point Monroe, knowing they were police but not knowing why he was being picked up . . ."

A. He knew why he was being picked up.

Q. "As Pape left the car, he said: 'If you think I did wrong, sue me.' "

A. That's not so.

Mr. Kaveny: No further questions of the witness.

The Court: Is there any cross-examination, Mr. Reuben?

Mr. Reuben: May I see that exhibit, sir?

(There was a short interruption, after which the following further proceedings were had herein, in the presence of the jury, to-wit:)

[435] Mr. Reuben: Is this No. 1?

Mr. Kaveny: That is No. 1, sir.

Cross-Examination by Mr. Reuben.

Q. Do you make any point of the fact that Fletcher Martin, the Sun-Times reporter, is a Negro?

A. No, sir.

Q. He is a Negro gentleman, is he not?

A. Well, frankly, I don't know him personally.

Q. All right.

Did you have Plaintiff's Exhibit 1 in evidence before you when you led the arrest of James—I withdraw that.

Did you see Plaintiff's Exhibit 1 in evidence before you went out to arrest James Monroe?

A. I saw something of his record. I don't know whether that is exactly it or not. Some background information.

Q. Did you know his record up to March 11, 1955? Was that recorded on the record that you saw?

A. I don't recall.

Q. You do not remember.

Did you know that he was arrested for armed robbery and convicted?

[436] A. Oh, yes.

Q. You knew that?

A. I knew that, yes, sir.

Q. It is still your testimony that you very socially

knocked on the door and very carefully and very socially entered his bedroom?

Mr. Kaveny: Objection, your Honor. That is a characterization.

The Court: Let counsel finish his question and I will rule on it.

Mr. Kaveny: I thought he had finished it, your Honor.

Q. Is it still your testimony, as it was yesterday, that with seven men from the Homicide Division and yourself, knowing that you had an armed robber or a man who had been convicted of armed robbery, who had been accused of murder, and that you were going to the Fillmore District, that you very carefully knocked on the door, you very gingerly went up to Mr. Monroe and awakened him and you were very kind in your treatment of him? Is that your testimony?

A. That's correct.

[437] Mr. Kaveny: Objection, your Honor.

Mr. Reuben: That is all.

The Court: The witness has answered. It may stand. Is there any redirect?

Mr. Kaveny: No redirect, your Honor.

The Court: All right. Thank you sir, you are excused.

(Witness excused.)

The Court: You may call your next witness.

Mr. Kaveny: May I see you for a moment at sidebar, your Honor?

The Court: Yes.

(Whereupon a sidebar conference ensued, outside of the hearing of the jury and the court reporter.)

Mr. Kaveny: Your Honor, at this point the Plaintiff also rests.

The Court: Is there any surrebuttal on behalf of the defendant?

Mr. Reuben: There is not, your Honor.

The Court: Both sides rest?

Mr. Kaveny: Yes, sir.

Mr. Reuben: Yes, sir.

[438] The Court: Ladies and gentlemen, you will be excused until ten o'clock tomorrow morning.

Will you take the jury to the jury room, please.

(There was a short interruption, after which the following further proceedings were had herein, in open court, out of the presence and hearing of the jury:)

The Court: Do you desire to make an offer of proof at this time?

Mr. Kaveny: Yes, your Honor.

The Court: All right.

Mr. Kaveny: If allowed to testify, Captain Pape would identify some eleven scrapbooks, which are here in the court room, which he has maintained since prior to 1950, containing voluminous news articles of and concerning himself and his tenure in the Chicago Police Department, with the arrest records and convictions by various persons and organizations, including the leading newspapers of the City of Chicago. He would also [439] identify some 30 to 40 magazines published nationally, which are also present in the court room, in which he has also appeared by name, detailing various arrests and awards and what-have-you that he has received during his tenure as a Chicago police officer.

These are offered, sir, to offset the TIME morgue and also to show that the TIME morgue is, at best, a skeletal morgue and is in no way complete regarding this gentleman.

The Court: Do you have any statement to make as to your objection?

Mr. Reuben: I am sure that Captain Pape has collected the scrapbooks. The issue before the Court is whether TIME knew the article was false or had reason to believe so. The articles in question were offered to show that from the material available and from the information before the people who were writing a report about Justice, they had no reason to believe the matter was false and had every reason to believe the matter was true.

What Mr. Kaveny seems to be saying is that there is some duty on the part of a media to be as [440] resourceful—I am sure Mr. Pape likes to see his name in the paper, so he collects all the clippings, but Mr. Kaveny nor Mr. Pape can impose a duty upon media to be as diligent about clipping Mr. Pape's name and preserving it for the annals as Mr. Pape is. This is an impossible burden, and there is no duty—duty is otherwise. There is no obligation to go seek out. TIME had its own reporter's report. It had a report from a man who has now been identified as a respected reporter in Chicago, Sun-Times, not a New Yorker from the New York Post. It appeared in the New York Post.

Under the circumstances, I do not see that the evidence that they are offering is relevant or material or of probative value or has any relationship to the material in TIME's file.

The Court: You are talking about the scrapbooks?

Mr. Reuben: Yes, sir.

The Court: Is there any response?

Mr. Kaveny: Yes, your Honor. The TIME magazine [441] and the posture of the law is saying, "We were cautious, we believed what we had was true. We were acting reasonably. Here is what we examined to reach that conclusion," and they introduce eight pieces of items from

their morgue, four of which, I believe, were prepared by their own staff in Chicago and never reached print, and one from the New York Post, and one from the New York Times. If they were so diligent in picking up an item from the New York Post and in telegraphing Chicago or calling Chicago to inquire as to his name, and they are relying upon this good faith diligence, then I also feel that some of these items in this srapbook should have appeared in that morgue at some time. The commendatory things are missing. All the dirt is there.

Mr. Reuben: That is not true.

The Court: The offer of proof is refused.

Mr. Kaveny: Thank you, your Honor.

Mr. Reuben: I have a motion.

The Court: All right. You may proceed with any other motions.

[442] Mr. Reuben: This is a motion for a verdict at the close of all of the evidence. I am not going to labor it. I spoke yesterday of the chilling effect. I think the Court is familiar with the facts of all of the cases. I would like to point one thing out:

In the New York Times case the Court held there was no malice for the jury when the morgue was at variance with the article published. The Court said that did not make difference. The article was an advertisment, and I suppose the advertising department, as is traditional with most newspapers, does not talk to the editorial department. The editorial department does not talk to the advertising department.

At any rate, that was in the New York Times case. Nevertheless, there was not actual malice. In the instant case, you have now heard, your Honor, the witness testify fully as to his belief, together with the supporting exhibits, the researcher, the diligence. This is no malice as a matter of law under any test. This is a record that nobody had

before, prior to today. I suggest to your Honor that it would be unjust, unconstitutional, [443] and contrary to the weight of authority, authority as late as last week, to submit this case to a jury, regardless of whether your Honor may think that the jury would be persuaded or unpersuaded. I think this is the kind of a case that, if it goes to the jury, is going to have a chilling effect.

The Court: Let me ask this one question: Is there any difference, if I would direct a verdict, whether I would direct it now or after it is submitted to the jury and the verdict returned? I am thinking about appeal and all of the other matters which we always carefully consider.

Mr. Reuben: Your Honor, I am thinking about it as well as anybody else. I am certainly conscious of it. I do not like to lose cases any more than the next fellow, maybe a little less. I remember Bill Veeck once said to me, "If it's not you win or lose, but how you play the game, why do they keep score?"

I think that the answer to that is contained in Judge Tuttle's opinion. I think that the answer to that [444] is that it is the philosophy and purpose of the First Amendment, different than any other cases and different than, if you will, the ordinary case before the Court, to stop the action as quickly as possible. They did a remarkable thing in the case that Mr. Medina argues in the Fifth Circuit. They took the case on an interlocutory appeal from a denial, and the Court italicized the word "denial", of a motion for summary judgment to stop the action.

The Court: We had two motions for summary judgment. They have already been up and are back down again.

Mr. Reuben: My point is that that was a long time before St. Amant and all of the New York Times, if you will, progeny. I think it is at this point, if the Court believes as I believe, if the Court finds as I think it must,

that as a matter of law there was no actual malice, it is the duty of the Court to stop this and not submit it to a jury and not put the publisher through all of the burden of arguing to a jury.

[445] The Court: You have not answered the one question I asked you, Mr. Reuben. Is there any different posture—

Mr. Reuben: Yes.

The Court: —either as to the weight or otherwise that I should give the evidence if there is a directed verdict now or if there is a verdict for the plaintiff on the issue that will be submitted to the jury?

Mr. Reuben: Yes, I think there is. I think that it is an indication that these cases are going to go to the jury and the Courts are going to say, "Let's wait and see. I can always direct afterward," and I think in these kinds of cases the Court should stop it. I really do. There is a difference. It means that when the Court may feel, when the Court does feel that there is no malice as a matter of law, nevertheless you are going through the whole sequence of a trial, and then at the end of the Court feels there was no malice all the way through, the Court says, "Well, all right. I will right the wrong."

The expense involved, the time involved and the [446] cost involved—

The Court: We probably have another two hours of effort here; in other words, your arguments and the charge.

Mr. Reuben: I am looking down the pike a long, long way in terms of the First Amendment, is what I am saying to you, and I think it is bad precedent, it is unconstitutional precedent, and it is bad practice, if the Court believes there is no malice, to submit the question of malice and force a publisher to argue it to a jury. I think that is saying to publishers, to this publisher, as I say, who can afford it—if I wanted to give Mr. Pape a list of my

clients, he could put all four of my kids through school—but I think it is telling publishers that even if the Court firmly believes there is no actual malice, you are going to go to a jury, even if the plaintiff comes with no evidence, which I think this is. I think this is absolutely no evidence of malice. This plaintiff has had the forebearance of this Court for three days now to prove malice, and if your Honor please, as I believe the record manifestly [447] discloses, there is no malice, and I say to your Honor that it should not go to a jury. I think that it is wrong, it is unconstitutional, I think there is a great evil here.

I say the evil is No. 1. This is a precedent that your Honor is setting. This is one of the few cases being tried in this District under New York Times at this point in life, and if your Honor says—and this is a case of some note and import in the publishing industry—if your Honor now says, "Although I firmly believe there is no malice, go to the jury and then I will right the wrong, if any."

I submit, your Honor, that that is a chilling effect.

The Court: Mr. Kaveny.

Mr. Kaveny: Your Honor, I must ask the indulgence of all concerned. I mentioned to you in chambers before that I wished to offer into evidence the amended complaint in Monroe versus Pape, and did not offer it. I also have the second amended complaint, both [448] of which I would like to offer. I would like to open my case long enough to offer these into evidence.

The second amended complaint is the one on which we actually went to trial.

Mr. Reuben: When were these filed, do you know? I would like to know when were the complaints filed?

Mr. Kaveny: Prior to the jury trial.

Mr. Reuben: I understand that, but that does not help me. Was it before or after the article complained of?

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Mr. Kaveny: The article complained of was a report of the Supreme Court decision.

Mr. Reuben: These were amendments afterwards?

Mr. Kaveny: It had to be.

Mr. Reuben: If that is made clear to the jury, I have no objection. If you want to put them in, that is all right with me.

Mr. Kaveny: I would like to put them in.

The Court: All right. Is there any objection on your part?

Mr. Reuben: No so long as it is made clear [449] to the jury.

The Court: All right. Have them marked.

Mr. Kaveny: Plaintiff's Exhibits 2 and 3, your Honor.

(The documents were thereupon marked Plaintiff's Exhibits 2 and 3, respectively.)

The Court: Yes, Mr. Kaveny.

Mr. Kaveny: Your Honor, on this question of malice, I submit to the Court, contrary to what Mr. Reuben says, I believe we have raised enough of a question to make it a question of fact. I believe we have introduced enough evidence to make it a question of fact, to make it a jury question. We have the police officers' testimony, which has not been contradicted by a soul, although an attempt was made with a newspaper article. The police officers' testimony—

The Court: No, those articles were not offered. All they were offered for was to show that these articles had been published and they were in the morgue. I instructed the jury that this did not mean that this [450] was the truth or the facts.

Mr. Kaveny: The police officers' testimony lends to these articles a high degree, and in this particular article, a high degree of improbability. In this article it lists that

police officers were shoving, assaulting, pushing children; forcing adult individuals to parade naked in front of their children. We have a report, and granted it is a complaint, in which this is set forth, but when TIME magazine gets ahold of it, as our Court of Appeals has said, they change it from being a statement of what James Monroe alleged happened to a statement of fact found to be true by Justice, and they condition the reader, paraphrasing that opinion, by the opening lines, and it stands as a chilling indictment or grave indictment and a chilling effect, and then we are conditioned further by the incident involving two other officers, and then we get to Mr. Pape, and he is named, "Shifting to the north, ostensibly investigating a murder".

"Thirteen police officers," says Justice, "broke through three doors." The Court has that and I repeat this [451] to you because we asked Mr. Magnuson what sources he used before he committed such a travesty, and he has not—we asked him did he know. He is a police reporter. He knows what a complaint is, he knows what allegations are, he knows what alleging is, and we asked him. He says that he can see no difference.

Your Honor, I submit that the jury can see the difference and we are entitled to have the jury determine if this man read that.

The Court: All right. Let me ask a couple of questions.

Number One, you raise all of these issues and all of these points. What I am confronted with here is as to whether this was willful and whether it was malicious. As this record now stands, I know of no evidence in it, either by any of the plaintiff's witnesses that there was any feeling against Captain Pape—

Mr. Kaveny: Other than what may be—

The Court: Let me continue and then you may reply to my questions.

Mr. Kaveny: I am sorry, your Honor.

[452] The Court: The record is also clear, and there is nothing in the record to show, that you asked Mr. Magnuson, who wrote the editorial, or anybody else any questions as to whether they knew of Captain Pape or not.

Mr. Kaveny: Yes, sir.

The Court: The whole question we have here is whether the failure to say that a complaint stated this or alleged this is willful and malicious as set forth from the New York Times on through the recent case, all of which I know you are well aware of.

Mr. Kaveny: Yes, sir.

The Court: The guts of this case, so to speak, is if the words "alleged" or "complaint" were there—

Mr. Kaveny: We would have no case.

The Court: —there would be no case.

Mr. Kaveny: We would have no case, your Honor.

The Court: All right. Their having failed to do that and no evidence being in this record of any willfulness, there were no questions here of Mr. Magnuson and, [453] of course, you were not able to interrogate the researcher here, but it was a deposition that you took, I think, Mr. Kaveny.

Mr. Kaveny: It was my deposition, your Honor.

The Court: There were no questions asked of her in connection with that. There was her examination of it. We have the record. Does the failure to include the statement at the beginning of the article with the words "alleged" or "complaint" amount to willful and malicious conduct? That is just what we come down to on the part of TIME magazine. I would just like your comments.

Mr. Kaveny: The Court said a moment ago, "in all of the cases." I take it the Court is reading into willful and malicious this reckless disregard.

The Court: That is right. That is what it all amounts to.

Mr. Kaveny: I cannot conceive, sir, that you could

take such a damaging complaint as set forth in Justice and read it and note in there, sir, in Justice, they [454] are most cautious about saying, "Although it does not dispose of the case, the Supreme Court recently held that you could sue a Chicago policeman on the basis of a complaint which alleged . . .", and then they do not attempt to do anything with it. Take Justice Felix Frankfurter's opinion, which we, as lawyers, are all familiar with. In the opening of most opinions, we find the complaint summarized in identical language, a run-on sentence broken up with a series of semicolons and phrases commencing with "that". To take that and to change it from an allegation to an absolute finding of fact that a Chicago police officer whose reputation stood or fell on it, I mean, to arrest a man without a warrant or to accuse him of, perhaps to use the street vernacular, leaning on a man a little bit, but this is item after item after item after item; assaulting children, forcing their parents to parade naked. The hideousness of it, your Honor, and then to take it as simply to take out its guts—

The Court: We are not trying to Post case here. [455] There is nothing in this article that has that in it.

Mr. Kaveny: You said we stand or fall on whether or not the words "complaint" and alleged" were in there.

The Court: Yes.

Mr. Kaveny: Granted, it is a word that was taken out of an article with if you will, deletion of words and placing periods in it. This total thing together turned what was a complaint into a tremendously damaging statement of fact as found by a federal government or a government commission, sir.

The Court: All right; thank you.

Mr. Reuben: I would like to say that I suppose I object to the Court's statement of the issues because it is so beautiful I wish I would have said it myself. Your Honor has fastened right onto the legal issue. I think Mr. Kav-

eny's hang-up is that he is trying Monroe versus Pape. He is telling us what the police officers said. He is telling us what the police officers said. This is the way he tried the whole case, on what the police officers said.

Prior to today, if you will, prior to the full day [456] today, there was not before anybody what TIME magazine did, and I am asking your Honor to say that in light of what TIME magazine had in its files, in light of what its own people had told it out of Chicago, as well as the clips, in light of what Justice said, in light of the stipulation that this was put into Justice after an investigation by the Civil Rights Commission, as a matter of law TIME was not recklessly disregarding the truth, was not deliberately and knowingly printing falsehoods when it printed what it did without using the word "alleged."

If I may paraphrase your Honor, your Honor's question to Mr. Kaveny, which I do not think he answered, was whether in light of this record not saying "alleged," which would have killed his lawsuit, by his own tongue—he admits it—is New York Times malice, as it has come to be expanded and enormously expanded in the St. Amant and in the Beckley case, and I say to your Honor that that is the legal issue which has to be decided. I do not think there is any way to decide [457] it but for the defendant. I think that it would be really a very horrendous thing if your Honor, by letting this go to the jury, held that this removal of this word, which is all he is talking about, in the face of what TIME did and without any indication from anywhere that this article was false, and everything indicating it was true, in light of all of this, I think it is plain unconstitutional to send this to the jury at this time.

I would say one other thing, and that is that even the favorable—and there was a favorable article which Mr. Kaveny did not read, in TIME magazine's file. It indicates this was a tough, rough guy, a kind of a fellow who

would do this, and Mr. Kaveny's whole problem is he finds malice, actual malice, with what all that means today, because TIME magazine did not regard the Justice report as simply Monroe's complaint in light of all it had.

That, your Honor, under any decision, under any stretch, on this record, is not sufficient to go to the jury.

The Court: All right. I will take that matter [458] under advisement and I will announce my decision. I will see counsel in chambers for a few moments.

I will announce my decision at ten o'clock tomorrow morning.

January 16, 1969,
10:30 o'clock a.m.

Court convened pursuant to adjournment.

[460] The Clerk: 61 C 2202, Frank Pape against TIME, INC., case on trial.

The Court: Good morning, ladies and gentlemen of the jury.

Good morning, Counsel.

Mr. Reuben: Good morning, your Honor.

Mr. Kaveny: Good morning, your Honor.

The Court: Ladies and gentlemen of the jury, after you were excused yesterday the Court heard argument in connection with this case. I am going to read a decision now. The sum and substance of that decision is that I am taking the case from the jury. I think you are entitled to hear my reasoning on it because you have sat through this case patiently and have listened very carefully. This is a part of our system of justice and of the responsibility of the Court. There are certain responsibilities of the jury. From the reading of this opinion, you will see, and I hope understand, the basis upon which the Court reached its decision.

I might say to counsel at this time that I am going to read this. It is merely a rough draft, not a [461] smooth

copy, with many deletions and changes which have been made because this was worked on until late last night as a result of conclusions that we reached, and again changed this morning, but a smooth copy will be prepared, and I would say counsel can pick that up tomorrow morning.

Mr. Reuben: Very good, your Honor.

The Court: The defendant has moved for a directed verdict at the close of all the evidence. For the reasons set forth below this Court is of the opinion that the motion should be granted.

The plaintiff, Frank Pape, is suing Time, Incorporated, for libel allegedly arising out of an article published November 24, 1961, which described the search of James Monroe's apartment on the West side of Chicago and Monroe's subsequent arrest by the plaintiff and seven fellow police officers. The plaintiff is a "public official," Pape v. Time, Inc., 354 F. 2d 558, 560 (7th Cir. 1965), and in order for such a public official to recover a libel judgment against the present defendant, he must prove "with convincing clarity" that the article was [462] false and was published with actual malice. New York Times Co. v. Sullivan, 376 U. S. 254, 285-286 (1964); Garrison v. Louisiana, 379 U. S. 64 (1964); St. Amant v. Thompson, 390 U. S. 727 (1968).

"Actual malice" has been defined as false statements published with the knowledge that they are false, or with reckless disregard as to their truth or falsity. New York Times v. Sullivan, Supra.

"Reckless disregard" may be shown to exist where there exists "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant, Supra, at 731. In addition, "recklessness may be found where there are obvious reasons to doubt the accuracy of (an) informant or the accuracy of his reports." Id. at 732.

In order to preserve First Amendment rights, it is clear that "some erroneous publications (must be protected) as well as true ones." In determining whether actual malice exists, the writer's personal belief that [463] his story is true is important, but is only one factor to consider. Id. at 732.

In the article complained of in this case, the defendant's writer, Edward F. Magnuson, a veteran reporter, purported to quote part of the publication, Justice, which was compiled by the members and staff of the United States Civil Rights Commission. The portion of the article complained of is as follows:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by thirteen police officers, ostensibly investigating a murder. The police, says Justice, 'broke through two doors, woke the Monroe couple with flashlights, and forced them to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with [464] his flashlight, calling him "Nigger" and "black boy." Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing the clothing from closets to the floor, dumping drawers, ripping the mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

TIME magazine, November 24th, 1961, at 16.

This quote omits the words which immediately preceded it. The Justice report states that these were allegations

contained in a complaint. This omission, which has been ruled to be at least "negligent" is not enough to sustain the plaintiff's burden of proof (as outlined above), since the standard for actual malice is far stricter than the standard for negligence. Pape v. Time, Inc., 354 F. 2d 558, 560 (7th Cir. 1965).

[465] This Court, therefore, must look further into the background of this article.

Mr. Magnuson testified that he read the omitted words, but decided not to include them in the article as it appeared in TIME magazine. He explained the omission by pointing out that the Civil Rights Commission, appointed by the President, was set up by Congress to report on the problems of minorities, and its members were highly respected individuals. This meant to him, he testified, that if an example was used in the test of the report, it was considered by the Commission to be "substantially" true, no matter how the example was worded. In some of the examples, the words "alleged" or "allegation" were not used; in others, such as the one before this Court, those words were used. Although the Justice report did warn that they had made no conclusive determination of the correctness of the statements of the complaints or officers, the report also said that, "the allegations appeared substantial enough to justify discussion in this study." Justice, [466] at 5. This statement modifies the whole report, and thereby makes almost all the examples contained in the report "allegations" of one sort of another, except where (in two cases) convictions had been obtained. Therefore, the appearance of the word "alleges" at the beginning of the section in Justice describing the plaintiff's activities is not of controlling significance. It was undisputed in the record that Mr. Magnuson in personal good faith interpreted the word "alleges" in the light suggested above. Professions of good faith, however, may not be

sufficient in certain cases. St Amant, Supra. It is vital to describe the research that went into this article.

It has been stipulated between the parties that Mr. Magnuson consulted three sources before he wrote the article: The Justice Report itself, a press release issued by the Civil Rights Commission concerning its Justice volume (Defendant's Exhibit (DX) G), and a news article in the New York Times of November 17, 1961 (DX H).

All of these, if they mention the Pape incident at [467] all, refer to the fact that the statements were contained in a complaint. After the article was drafted, it was sent to Champ Clark, then editor of the National Affairs Section, who in turn, according to an established procedure, sent it to the defendant's Research Department. The article was checked for factual accuracy by Miss Karen Burger, (now Mrs. Karen Booth), whose deposition was read in open court. Her job was to make corrections in consultation with the senior editor and the writer. She testified that she did not call the omission to their attention, since she had determined that the writer had good reasons for the omission and that the quote was factually accurate. In order to make this determination, she rechecked the three sources that Magnuson used, and also consulted the defendant's informational reference library, commonly known as the "morgue", and obtained all the materials relating to Frank Pape and the case of Monroe v. Pape, 365 U. S. 167 (1961). Stipulation, Paragraphs 25 and 26; DX I through DX P. In order to determine what information was available to the defendant, it will be necessary [468] to examine some of these documents in more detail. The article from the New York Post of Monday, February 27, 1961, DX I, purported to be a first person account by James Monroe of the events surrounding his arrest and subsequent release. The article does not state explicitly that Monroe's statements were merely allegations in a

complaint, and the facts related by Monroe follow substantially the account given by Magnuson in the accused article. However, it should be noted that in the introductory paragraphs, the Post said that the narrative which followed was in Monroe's own words, and was his "recollection of what happened." The introduction also points out that the Supreme Court has only allowed Monroe to "sue thirteen white policemen for abusing him and his family," and that, impliedly, the actual facts might not be as described in the narrative.

The New York Times article (DX-P) of February 21, 1961, sounds a similar cautionary note. It said that, [469] "a Chicago Negro handyman, James Monroe, brought the case after thirteen city policemen broke into his apartment early one morning. He said that they had hit him, made him and his wife stand naked while they searched the apartment without a warrant, then held him illegally in jail before finally releasing him without charges." (Emphasis added.) The reference to the fact that a case was brought, and that Monroe "said" that he had been abused highlight the apparent lack of certainty which the New York Times evidenced. Exhibit L also emphasized the fact that Monroe only "claimed" that certain facts were true, and this exhibit was a dispatch from TIME's Chicago Bureau correspondent, Dudley Doust. Doust filed another report, one day later than Exhibit L, in which he did not mention that Monroe was only "claiming" that the incidents occurred (DX-J). The account in this exhibit did support the statements as made in the accused article. The other articles refer to the decision in Monroe v. Pape, Supra, and do not otherwise discuss the facts, or, [470] they refer to the plaintiff as being an "ungodly tough" but much decorated police officers. DX-K, DX-M and DX-N.

The Seventh Circuit Court of Appeals, albeit before the

St. Amant decision, Supra, had determined that the defendant, when it reworded parts of the Justice report, took the risk that it "might go too far" and indicated that a jury, on the facts before it, could decide that the defendant's acts were "reckless." Pape v. Time, Inc., 318 F. 2d 652, 655 (7th Cir. 1963), as quoted in Pape v. Time, Inc., 354 F. 2nd 558, 560 (7th Cir. 1965).

However, the Court did not have the complete record before it, as is presently the situation before this Court.

Even though the defendant showed at trial that the Monroes recovered an $8,000 judgment against the plaintiff for violating their civil rights, this Court assumes for the purpose of argument, that the plaintiff has established, through the eight police officers' testimony, that the statements in the article were substantially false. [471] Even assuming this, the plaintiff has the burden of proving "with convincing clarity" that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as "substantially" true. This case is far easier than the New York Times v. Sullivan case, Supra, where there was no investigation whatsoever into the truth or falsity of the advertisement's representations. This case also does not fall within the St. Amant description of what kinds of publications fell outside the protections of the First Amendment. There the Court said, at 732:

> "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder [472] of fact must determine whether the publication was

indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." (Emphasis added.)

This decision, after the cases in the Seventh Circuit, indicates that where good faith can be shown, as here, and there has been no "fabrication," et cetera, the First Amendment demands that judgment be rendered for the defendant publisher. Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a "chilling effect" on the exercise of First Amendment rights and it might [473] compel a degree of self-censorship because of the reluctance on the part of a publication to enter into expensive litigation, Dombrowski v. Pfister, 380 U. S. 479 (1965, as cited in Time, Inc. v. McLaney, ... F. 2d. ....., No. 25585 (5th Cir. January 3, 1969).

At the close of plaintiff's case, defendant moved for a directed verdict. The Court might well have granted this. However, in the exercise of extreme caution and with due regard for the statements made by the Court of Appeals in the other Pape cases, Supra, the Court decided to wait until all of the evidence was in and a complete record was made. At the conclusion of the introduction of all the evidence, any lingering doubt that the Court may have had was completely eliminated.

It is therefore ordered that the defendant's motion for a directed verdict at the close of all the evidence be, and it is hereby granted.

It is further ordered that judgment be and it is hereby

rendered for the defendant on the issue of liability, [474] and the cause is hereby dismissed without costs.

Ladies and gentlemen, what that means is that I have taken the case from your consideration, and based solely upon the law as enunciated in the decisions I have outlined, have entered a judgment for the defendant at this time.

I want to express my appreciation to you for the way in which you have listened to this case. You are excused.

Mr. Marshal, you may take the jury to the jury room.

(There was a short interruption, after which the following further proceedings were had herein, in open court, outside the presence and hearing of the jury:)

The Court: Are there any motions or any comments?

Mr. Kaveny: Will the Court set a cost bond for appeal?

The Court: The Clerk sets the cost bond on that.

Mr. Kaveny: Thank you, sir.

The Court: You can determine that from him.

[475] Mr. Kaveny: Thank you, your Honor.

Mr. Reuben: Thank you, your Honor.

The Court: Thank you very much.

I wish to express my appreciation to counsel for both sides. You have handled this case ably and well. The Court reached its decision after very careful consideration, and it is the only conclusion, in my mind, that could be reached under all of the circumstances.

Mr. Reuben: I want to say that the Court's staff, the court reporters and everybody, were very hospitable to the lawyers, more so than, I suppose, lawyers are entitled to expect, even to the point of giving us coffee, Judge.

The Court: I expect that all members of my staff will be courteous to lawyers. The Court has that respon-

sibility also. I may not be at all times, but I certainly expect each and every member of the staff that surrounds me to afford counsel every consideration.

Thank you, gentlemen.

Mr. Kaveny: Thank you, your Honor.

Mr. Reuben: Thank you, your Honor.

[476] The Court: Recess.

(Whereupon the trial of the foregoing cause was concluded.)

EXHIBIT A.

In the United States District Court.

* * (Caption—No. 59C329) * *

COMPLAINT.

(Filed Mar 2, 59)

Jurisdictional Allegation

Jurisdiction is invoked under 28 U. S. C. A. §§ 1331 and 1343 and 42 U. S. C. A. § 1983, 1985 and 1986 and Amendment XIV to the Constitution of the United States.

Count I.

James Monroe, plaintiff, by his attorneys, Donald Page Moore, Ernst Liebman, and Rogers, Rogers, Strayhorn & Harth, complaining of the defendant's Frank Pape, and John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, John Doe #6, John Doe #7, John Doe #8, John Doe #9, John Doe #10, John Doe #11, and John Doe #12 (whose true names are presently unknown) and the City of Chicago, a Municipal Corporation of the State of Illinois, says:

1. This action arises under the Constitution and laws of the United States and the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

2. During all times herein mentioned, plaintiffs, and each of them, were, and they still are citizens of the United States or other persons within the jurisdiction thereof, and they resided, and now reside, in Chicago, Illinois.

3. During all times mentioned herein, the individual defendants, and each of them, were duly appointed, qualified and acting police officers of the Police Department of the defendant City of Chicago, a voluntary municipal corporation of the State of Illinois, and were agents of the said City, acting in the course of their employment and engaged in the performance of their duties as police officers of the said City.

4. During all times mentioned herein, the defendants and each of them were assigned to, and acting under the orders of, that subdivision of the said Police Department which is commonly known as the "Detective Bureau."

5. During all times herein mentioned, the defendant Frank Pape was, and he still is, the Deputy Chief of Detectives of the Chicago Police Department and was, and he still is, the second ranking officer in the aforesaid "Detective Bureau" of the Chicago Police Department.

6. During all times herein mentioned the individual defendants and each of them were acting under color of the statutes, ordinances, regulations, customs and usages of the State of Illinois, of the County of Cook and of the defendant City of Chicago.

7. The defendant City of Chicago is now, and at all times herein mentioned was, the employer of the individual defendants, and each of them. Said City at all times herein mentioned did, and does now, provide the individual

defendants, and each of them, with an official badge and identification card, which designates and describes its bearer as an officer of the said City's Department of Police. Said City is the municipal corporation in the name of which the individual defendants, and each of them, performed all acts and omissions alleged herein.

8. During all times herein mentioned, the plaintiff James Monroe was:

(a) The lawful husband of the plaintiff Flossie Monroe;

(b) The father of the plaintiff James Monroe, Jr., a minor;

(c) The step-father of the plaintiffs Lawrence Stevens, Ralph Stevens, Robert Stevens, Houston Stevens and Jacqueline Stevens, all of whom are minors.

9. During all times herein mentioned, the plaintiff Flossie Monroe was:

(a) The lawful wife of the plaintiff James Monroe;

(b) The mother of the plaintiffs James Monroe, Jr., Lawrence Stevens, Ralph Stevens, Robert Stevens, Jacqueline Stevens, and Houston Stevens.

10. On or about October 29, 1958, at about 5:45 A. M., the plaintiffs, and each of them, were asleep in their beds in the apartment where they reside as a family, located at 1424 South Trumbull Avenue, Chicago, Illinois. Then and there, the individual defendants, and each of them, broke and entered into the apartment of the plaintiffs through the front and rear doors thereof, and did the following acts, among others:

(a) Defendants Frank Pape, John Doe #1 and John Doe #2, entered the bedroom of the plaintiffs James Monroe and Flossie Monroe, where the said plaintiffs were asleep together in a bed. The aforesaid defendants then

and there shined their flashlights upon the faces of James and Flossie Monroe and pointed their service revolvers at James and Flossie Monroe. One of these three defendants commanded James Monroe to rise from his bed and walk into the living room, and as a result of this command the aforesaid James Monroe was forced to get out of his bed and walk into the living room stark naked and completely without clothing or other means to hide his nakedness. During the course of the aforesaid incident, the defendant Frank Pape, in the presence of Flossie Monroe, cursed James Monroe and threatened to shoot him if he did not obey the command of the various defendants with alacrity. While James Monroe was thus forced to stand naked in the center of his living room his children and stepchildren, who are the plaintiffs described in Paragraphs 8 (b) and (c) and 9 (b), were ordered into the aforesaid living room by the remaining defendants and forced to remain there in their night clothes.

(b) While the events stated in Paragraph 10 (a) were taking place, the defendant John Doe #1 was standing in the bedroom of James and Flossie Monroe. After James Monroe was forced at gun point to leave the aforesaid bedroom, the defendant John Doe #1 went to the bedroom closet and seized all the clothing therein and threw each article of clothing upon the floor, after scrutinizing the said articles separately. Meanwhile, the defendant John Doe #2 ordered the plaintiff Flossie Monroe to rise from her bed and walk into the living room. The plaintiff Flossie Monroe objected to this command and refused to rise from her bed because of the fact that she was completely naked and unclothed as she lay in her bed. Thereupon the defendant John Doe #2 seized the plaintiff Flossie Monroe by the arm and pulled the plaintiff Flossie Monroe from her bed while Flossie Monroe snatched a blanket with her free hand and attempted to hold the

said blanket before her in order to hide her nakedness from the aforesaid defendants. The plaintiff Flossie Monroe was then pushed, shoved and escorted into the living room where she was forced and compelled to stand beside her husband, the plaintiff James Monroe.

(c) At the time that the plaintiff Flossie Monroe was pushed, shoved and escorted into the aforesaid living room, the defendant Frank Pape repeatedly hit, struck, and jabbed a flashlight into the stomach of the plaintiff James Monroe while berating him, questioning him and referring to his race in derogatory terms, such as "nigger" and "black-boy."

(d) During the course of the events described in Paragraph 10 (a), (b) and (c) defendant John Doe #3 kicked the plaintiff James Monroe, Jr., who is a 4-year-old child, and, as a result thereof, the plaintiff James Monroe, Jr. fell to the floor and commenced to cry and wail loudly.

(e) Immediately after the events described in Paragraph 10 (a), (b), (c) and (d), the defendant Frank Pape struck the plaintiff Robert Stevens, knocking him down.

(f) Immediately after the event described in Paragraph 10 (e), the defendant Frank Pape pushed and shoved the plaintiff Houston Stevens in such a manner that the plaintiff Houston Stevens fell across and on top of the plaintiff Robert Stevens.

(g) At approximately the same time that the events described in Paragraph 10 (e) and (f) were taking place, or immediately thereafter, the plaintiff Jacqueline Stevens attempted to leave the aforesaid apartment by way of a back door in an effort to reach a telephone so that she might call a friend of the family and inform him of the foregoing events. Thereupon, the defendant John Doe #5 blocked the access of the plaintiff Jacqueline Stevens to the aforesaid back door and when Jacqueline Stevens further attempted to make her way past the defendant John

Doe #5, the aforesaid defendant pushed her to the floor and denied her access to the aforesaid back door and the aforesaid telephone.

(h) During the course of, and immediately after, the events described in Paragrpah 10, sub-paragraphs (a) through (g), the individual defendants and each of them proceeded to search each and every room of the apartment aforesaid. In the course of this search the defendants emptied all the drawers in the said apartment and dumped the contents of the said drawers upon the floor of the said apartment. Further, the defendants ripped and cut the coverings from various of the mattresses which they found upon the beds in the said apartment and threw the contents of all the closets in the apartment on the floor.

(i) Subsequent to the events related in subparagraph (a) through (h), the defendants selected and carried some articles of clothing into the living room and ordered the plaintiff James Monroe to dress himself. Thereupon, two of the defendants produced a pair of manacles or handcuffs, and with them chained the hands of the plaintiff James Monroe together. Thereupon, the individual defendants, and each of them, escorted the plaintiff James Monroe from the aforesaid apartment to an automobile, which was parked in an alley adjoining the building at 1424 South Trumbull Avenue, Chicago, Illinois.

(j) As the defendants were escorting the plaintiff James Monroe to the automobile described in subparagraph (i) above, the plaintiff Flossie Monroe asked several of the aforesaid individual defendants where they were taking her husband, James Monroe. The defendant Frank Pape in response to this question, told Flossie Monroe that James Monroe was to be taken to a police station "for questioning."

11. None of the individual defendants, at any of the times mentioned herein, and, more particularly, at the

time and place of the events alleged in Paragraph 10 above, had in his possession any warrant issued by any judge, court, or magistrate authorizing:

(a) A search of the aforesaid apartment; or

(b) The arrest of the plaintiff James Monroe; nor had any warrants in fact been issued by any judge, court or magistrate for the said arrest or search.

12. After the events described in Paragraph 10 (j) four of the individual defendants seated themselves in the automobile described in Paragraph 10 (j). One of these four individual defendants was the defendant Frank Pape. The four individual defendants thereupon proceeded in the aforesaid automobile from the alley adjoining the building at 1424 South Trumbull Avenue to the corner of Roosevelt Road and Homan Avenue, Chicago, Illinois, where the aforesaid automobile was parked and remained parked for approximately thirty minutes, while the plaintiff James Monroe and his captors remained seated therein.

13. At the conclusion of the events described in Paragraph 12, the individual defendants described in Paragraph 12 caused the plaintiff to be carried in the aforesaid automobile to the Central Police Headquarters of the Police Department of the defendant City of Chicago which headquarters is located at 1121 South State Street, Chicago, Illinois.

14. Upon his arrival at the aforesaid Central Police Headquarters at or about 6:00 o'clock A. M., the plaintiff James Monroe was placed in a locked and barred jail cell therein and was there imprisoned for approximately ten hours. During the course of this ten-hour period, the plaintiff was from time to time removed from the aforesaid jail cell and placed upon exhibition in a line of other individuals so that various persons could observe him and them. Also, during the aforesaid ten-hour period the

plaintiff James Monroe was subjected to intermittent interrogation concerning the alleged murder of an individual named Peter Saisi, who had been allegedly killed and murdered on October 27, 1958.

15. (a) Throughout the aforesaid ten-hour imprisonment, the plaintiff James Monroe:

(1) Was never brought before a judge, court or magistrate;

(2) Was never charged with a crime;

(3) Was never able to make bail or post a bond for his release because no bail had been set in his "case";

(4) Was not permitted to contact his attorney, his family, or his friends, and thereby inform them of his whereabouts, the circumstances of his imprisonment, and thereby also to obtain counsel and advice;

(5) Was not informed of any formal charges which were to be placed against him by the police or by any other person or persons;

(6) Was not informed of his privilege against self-incrimination;

(7) Was not informed of his right to the advice of an attorney.

Instead, the plaintiff James Monroe, was detained and imprisoned by the defendants and all of them upon the purported justification that he had been arrested and was held for "investigation," on "open" charges, by which terminology the defendants meant that he was not being held to answer to a charge of a violation of a statute or ordinance, but instead was being held without legal charge for the purpose of being investigated and interrogated and placed upon exhibition for viewing by the various victims

of various alleged crimes and by various police officers. This aforesaid imprisonment of the plaintiff James Monroe was committed by the defendants, and all of them, pursuant to the custom and usage hereinafter alleged in Paragraph 17 of this Count.

(b) At the conclusion of the aforesaid ten-hour imprisonment, the plaintiff James Monroe was released from custody by the defendants. He was not then charged with a crime or violation of ordinance, nor has he ever subsequently been so charged.

16. Throughout some or all of the period of plaintiff's imprisonment by the police, the following branches among others of the Municipal Court of the City of Chicago were in session in the Central Police Headquarters at 1121 South State Street, Chicago, Illinois:

Branch 27
Branch 40
Branch 41
Branch 42

Throughout some or all of the period of plaintiff's imprisonment by the police, the following additional branches (among others) of the Municipal Court of Chicago were in session in the City of Chicago:

Branch 25
Branch 28
Branch 30
Branch 32
Branch 34
Branch 35
Branch 36
Branch 38
Branch 39
Branch 43
Branch 44

Branch 46
Branch 47
Branch 52
Branch 54
Branch 57

All of the aforesaid branches have jurisdiction to grant police officers leave to file criminal and quasi-criminal complaints against arrested persons and have jurisdiction to admit arrested persons to bail.

17. At all times herein mentioned, it was, and it is now, the custom or usage of the Police Department of the City of Chicago to arrest and confine individuals in the police stations and jail cells of the said department for long periods or time on "open" charges. The said confinements on "open" charges are not for the purpose of detaining the arrested individual so that he might be promptly brought to court to answer to a charge of violation of the law, but are for the purpose of investigating and interrogating said individuals for some one or more of the following reasons:

(a) So that the said individuals may be induced, persuaded or coerced into making incriminating statements about themselves or others;

(b) So that the said individuals may be placed on exhibition before police officers and civilians for possible identification as having been the perpetrators of some crime or crimes;

(c) So that the said individuals may be held incommunicado while police officers are investigating and checking upon their character, occupation, associates and activities prior to their arrest;

(d) So that punishment of the said individuals by means of imprisoning them for varying periods of time might be inflicted by officers of the Chicago Police Department without a trial in a court of law.

18. The aforesaid acts of the defendants constituted a violation of the Constitution and laws of the United States of America, in that the plaintiffs, and each of them, were deprived by the defendants, and each of them, of their right to be secure in their home against arbitrary and unreasonable searches and seizures and of their right not to be deprived of their lives, liberties and property, without due process of law, all in violation of Amendment XIV of the United States Constitution and 28 U. S. C. A. § 1343 (3) and 42 U. S. C. A. § 1983.

19. On January 26, 1959, the following notice of claim for personal injuries was served upon John M. Marcin, City Clerk of the City of Chicago, and John C. Melaniphy, Corporation Counsel of the City of Chicago, in words and figures as follows:

"NOTICE OF CLAIM FOR PERSONAL INJURIES JAMES MONROE, ET AL.

vs.

CITY OF CHICAGO.

To: John C. Marcin
City Clerk, City of Chicago
107 City Hall,
Chicago, Illinois

John C. Melaniphy
Corporation Counsel
511 City Hall
Chicago, Illinois

Pursuant to statute, notice is hereby served on you that a right of action for personal injuries, and violation of Constitutional rights, has accrued against you by virtue of the wrongful acts of thirteen Chicago police officers, including among others, Lieutenant Frank Pape, and

twelve other Chicago police officers whose names are presently unknown to the persons who have been injured and to whom the cause of action indicated herein has accrued. We are the duly authorized agents and attorneys for the persons to whom the cause of action herein indicated has accrued, and we hereby give you the following particulars:

(1) The names of the persons to whom the cause of action accrued are: James Monroe, Flossie Monroe, James Monroe, Jr., Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, and Jacqueline Stevens. Flossie Monroe is the mother of and next best friend to the last five persons named in this paragraph.

(2) The names of the injured parties are those indicated in paragraph (1) herein.

(3) The names of the claimants are the same as those indicated in paragraph (1) herein.

(4) The address of the injured parties, and each of them, is 1424 South Trumbull Avenue, Chicago, Illinois.

(5) The alleged invasion of constitutional rights and personal injuries occurred on October 29, 1958, beginning at about 5:45 A.M., and continuing until approximately 6:00 P.M. on the same day.

(6) The alleged personal injuries and invasion of constitutional rights occurred at the premises occupied by the claimants and each of them at 1424 South Trumbull Avenue, Chicago, Illinois, and also in certain police vehicles which transported the claimant James Monroe to the Central Police Headquarters at 1121 South State Street, Chicago, Illinois, and also at the aforesaid Central Police Headquarters.

(7) The alleged personal injuries were sustained, and the alleged invasion of constitutional rights occurred, as follows: The aforesaid police officers illegally invaded, broke and entered, and conducted an illegal and uncon-

stitutional search and seizure and various assaults and batteries in the apartment occupied by the claimants at 1424 South Trumbull Avenue, Chicago, Illinois, at the time aforesaid. The aforesaid police officers also illegally arrested, seized, and confined the aforesaid James Monroe in a locked and barred jail cell at the Central Police Headquarters, 1121 South State Street, Chicago, Illinois, for a long time, to-wit: approximately twelve hours, in violation of his constitutional and statutory rights, and to his damage.

(8) There are no attending physicians involved.

Dated at Chicago, Illinois, this 27th day of January, 1959.

JAMES MONROE, FLOSSIE MONROE, and JAMES MONROE, JR., HOUSTON STEVENS, ROBERT STEVENS, LAWRENCE STEVENS, RALPH STEVENS, JACQUELINE STEVENS, (all of whom are minors), by FLOSSIE MONROE, their mother and next best friend,

By

DONALD PAGE MOORE, ERNST LIEBMAN, ROGERS, ROGERS, STRAYHORN, & HARTH
duly authorized attorneys and agents for the persons aforesaid,
105 West Adams Street, Chicago 3, Ill.
ST 2-1776"

20. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiff James Monroe suffered great bodily pain and injury and mental anguish, from then until now and he will continue so to suffer in the future; and he has lost and will in the future lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore plaintiff James Monroe demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action and he further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and he further demands such other relief as to this court seems just, proper and equitable.

Count II.

1-19. Plaintiff James Monroe incorporates and realleges herein Paragraphs 1 to and including Paragraph 19 of Count I of this complaint.

20. Prior to the events alleged in Paragraph 10 of this Count, the individual defendants entered into a conspiracy with each other for the purpose of impeding, hindering, obstructing or defeating the due course of justice of the State of Illinois with intent to deny to the plaintiff James Monroe the equal protection of the laws and with the intent to injure him for wrongfully enforcing or attempting to enforce his rights to the equal protection of the laws in that the individual defendants planned and agreed to commit all the acts alleged herein under the circumstances alleged herein.

21. In furtherance of the objects of the conspiracy alleged in the preceding paragraph, the defendants did or caused to be done the various overt acts alleged in Paragraphs 1 through and including Paragraph 19 of this Count.

22. The aforesaid acts of the defendants, and each of them, constituted a violation of Amendment XIV of the Constitution of the United States and of 42 U. S. C. A. § 1985 and 28 U. S. C. A. 1343.

23. As a direct and proximate result of the aforesaid acts of the defendants and each of them the plaintiff James

Monroe suffered great bodily pain and injury and mental anguish, from then until now and he will continue so to suffer in the future; and he has lost and in the future will lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff James Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and he further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and he further demands such other relief as to this court seems just, proper and equitable.

Count III.

1-21. Plaintiff James Monroe incorporates and realleges herein Paragraphs 1 through and including Paragraphs 19 of Count I of this complaint, and Paragraphs 20 and 21 of Count II of this Complaint.

22. Prior to the commission of the wrongs conspired to be done, as described in Paragraphs 1-21 of this Count, each of the defendants had knowledge of said conspiracy and of the objective thereof, and any one of said defendants had the power by reasonable diligence to prevent or aid in preventing the commission of the said wrongs. Nevertheless, none of the defendants made any effort to prevent or aid in preventing the commission of said wrongs. Therefore, each and every one of the defendants has violated the provisions of 42 U. S. C. A. § 1986.

23. As a direct and proximate result of the foregoing acts and failure to act of the defendants, and each of them, the plaintiff James Monroe suffered great bodily pain

and injury and mental anguish, from then until now and he will continue so to suffer in the future; and he has lost and in the future will lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts and failures to act of the defendants.

Wherefore, plaintiff James Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and he further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and he further demands such other relief as to this court seems just, proper and equitable.

Count IV.

1-19. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 1 to and including Paragraph 19 of Count I of this complaint.

20. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiff Flossie Monroe suffered great bodily pain and injury and mental anguish, from then until now and she will continue so to suffer in the future; and she has lost and will in the future lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Flossie Monroe demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action and she further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One

Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and she further demands such other relief as to this court seems just, proper and equitable.

COUNT V.

1-19. Plaintiff Flossie Monroe, incorporates and realleges herein Paragraph 1 to and including Paragraph 19 of Count I of this complaint.

20. Prior to the event alleged in Paragraph 10 of this Count, the individual defendants entered into a conspiracy with each other for the purpose of impeding, hindering, obstructing or defeating the due course of justice of the State of Illinois with intent to deny to the plaintiff Flossie Monroe, the equal protection of the laws and with the intent to injure her for wrongfully enforcing or attempting to enforce her rights to the equal protection of the laws in that the individual defendants planned and agreed to commit all the acts alleged herein under the circumstances alleged herein.

21. In furtherance of the objects of the conspiracy alleged in the preceding paragraph, the defendants did or caused to be done the various overt acts alleged in Paragraphs 1 through and including Paragraph 19 of this Count.

22. The aforesaid acts of the defendants, and each of them, constituted a violation of Amendment XIV of the Constitution of the United States and of 42 U. S. C. A. § 1985 and 28 U. S. C. A. 1343.

23. As a direct and proximate result of the aforesaid acts of the defendants and each of them the plaintiff Flossie Monroe suffered great bodily pain and injury and mental anguish, from then until now and she will continue so to suffer in the future; and she has lost and in the future will lose large sums of money by reason of having been greatly humiliated and held up to public scorn

and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Flossie Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and she further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and she further demands such other relief as to this court seems just, proper and equitable.

Count VI.

1-19. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint.

20-21. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 20 and 21 of Count V of this complaint.

22. Plaintiff Flossie Monroe incorporates and realleges herein Paragraph 22 of Count III of this complaint.

23. As a direct and proximate result of the foregoing acts and failures to act of the defendants, and each of them, the plaintiff Flossie Monroe suffered great bodily pain and injury and mental anguish, from then until now and she will continue so to suffer in the future; and she has lost and in the future will lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts and failure to act of the defendants.

Wherefore, plaintiff Flossie Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and she further

demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and she further demands such other relief as to this court seems just, proper and equitable.

COUNT VII.

1-19. Plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr. (all of whom are minors and appear here by Flossie Monroe, their mother and next best friend) incorporate and reallege herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint.

20. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr., and each of them, suffered great bodily pain and injury and mental anguish, from then until now and will continue so to suffer in the future; and each of them has been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Houston Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Robert Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars

($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Lawrence Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Ralph Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Jacqueline Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00), and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff James Monroe, Jr. demands judgment against the defendants and each of them, jointly and

severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

COUNT VIII.

1-19. Plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr. (all of whom are minors and appear here by Flossie Monroe, their mother and next best friend) incorporate and reallege herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint.

20. Prior to the event alleged in Paragraph 10 of this Count, the individual defendants entered into a conspiracy with each other for the purpose of impeding, hindering, obstructing or defeating the due course of justice of the State of Illinois with intent to deny to the plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens and James Monroe, Jr. the equal protection of the laws and with the intent to injure them for wrongfully enforcing or attempting to enforce their rights to the equal protection of the laws in that the individual defendants planned and agreed to commit all the acts alleged herein under the circumstances alleged herein.

21. In furtherance of the objects of the conspiracy alleged in the preceding paragraph, the defendants did or caused to be done the various overt acts alleged in Paragraphs 1 through and including Paragraph 19 of this Count.

22. The aforesaid acts of the defendants, and each of

them, constituted a violation of Amendment XIV of the Constitution of the United States and of 42 U. S. C. A. § 1985 and 28 U. S. C. A. 1343.

23. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr., and each of them, suffered great bodily pain and injury and mental anguish, from then until now and will continue so to suffer in the future; and each of them has been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Houston Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly, and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Robert Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Lawrence Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further de-

mands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Ralph Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Jacqueline Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff James Monroe, Jr. demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Count IX.

1-19. Plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr. (All of whom are minors and appear here by Flossie Monroe, their mother and next best friend) incorporate and reallege herein Paragraphs 1 through and including Paragraph 19 of Count I of this complaint.

20-21. The above plaintiffs incorporate and reallege herein Paragraphs 20 and 21 of Count VIII of this complaint.

22. The above plaintiffs incorporate and reallege herein Paragraph 22 of Count III of this complaint.

23. As a direct and proximate result of the aforesaid acts and failures to act of the defendants, and each of them, the plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens and James Monroe, Jr., and each of them, suffered great bodily pain and injury and mental anguish, from then until now and will continue so to suffer in the future; and each of them has been greatly humiliated and held up to public scorn an derision as a result of the foregoing acts and failures to act of the defendants.

Wherefore, plaintiff Houston Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Robert Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars

($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Lawrence Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Ralph Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff Jacqueline Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) and further demands such other relief as to this court seems just, proper and equitable.

Wherefore, plaintiff James Monroe, Jr. demands judgment against the defendants and each of them, jointly and

severally in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) and further demands such other relief as to this court seems just, proper and equitable.

JAMES MONROE, FLOSSIE MONROE, and HOUSTON STEVENS (a minor), ROBERT STEVENS (a minor), LAWRENCE STEVENS (a minor), RALPH STEVENS (a minor), JACQUELINE STEVENS (a minor), and JAMES MONROE, JR. (a minor), by FLOSSIE MONROE, their mother and next best friend,

Plaintiffs,

By.....

DONALD PAGE MOORE, ERNST LIEBMAN, and
ROGERS, ROGERS, STRAYHORN & HARTH,
105 West Adams Street,
Chicago 3, Illinois,
STate 2-1776,

Their Attorneys.

DEFENDANT'S EXHIBIT B.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

JAMES MONROE, et al.
vs.
FRANK PAPE, et al.
} No. 59C 329

VERDICT

(Filed Dec. 4, 1962)

We, the Jury, find in favor of the Plaintiff James Monroe and against the defendant Frank Pape.

We assess his damages in the sum of $5,000.00.

/s/ W. BEHRENDT, *Foreman*
/s/ JASPER G. BYRD
/s/ ESTELLE M. ALLEN
/s/ MARIE R. PAUGA
/s/ FRANCES J. KUCZAK
/s/ EVA M. ALLEN
/s/ DANIEL M. PASOWICZ
/s/ STELLA MARTYNOWICZ
/s/ ELIZAH MONDY
/s/ MILDRED W. ANDERSON
/s/ WANDA LYTLE
/s/ ANITA GARRETT

A True Copy Attest
ELBERT A. WAGNER, JR., *Clerk*
By: /s/ DOROTHY ALDRIDGE
Deputy Clerk

U. S. District Court, Northern District of Illinois
Jan 24 1967

DEFENDANT'S EXHIBIT C.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

JAMES MONROE, et al.
vs.
FRANK PAPE, et al.

No. 59C 329

VERDICT

(Filed Dec. 4, 1962)

We, the Jury, find in favor of the plaintiff Flossie Monroe, and against the defendant Frank Pape.

We assess her damages in the sum of $3,000.00.

/s/ W. BEHRENDT, *Foreman*
/s/ JASPER G. BYRD
/s/ FRANCES J. KUCZAR
/s/ ESTELLE M. ALLEN
/s/ MARIE R. PAUGA
/s/ EVA M. ALLEN
/s/ DANIEL M. PASOWICZ
/s/ STELLA MARTYNOWICZ
/s/ ELIZAH MONDY
/s/ MILDRED W. ANDERSEN
/s/ WANDA LYTLE
/s/ ANITA GARRETT

A True Copy Attest
ELBERT W. WAGNER, JR., *Clerk*
By: /s/ DOROTHY ALDRIDGE
Deputy Clerk

U. S. District Court, Northern
District of Illinois
Jan 24 1967

DEFENDANT'S EXHIBIT D.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

_____ DIVISION

Name of Presiding Judge, Honorable [illegible]

Cause No. 62 C 224 Date Nov 21, 1962

Title of Cause James Monroe et al v. Frank Pape et al

Brief Statement of Motion Trial

The rules of this court require counsel to furnish [illegible] entitled to notice of the entry of an order and the names and [illegible] of Judge. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

DEPUTY CLERK
U. S. DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
DATE: JAN 2 [illegible]

Court gives jury further instructions. Jury retires to continue deliberation. Jury returns verdict.

"We, the jury, find in favor of the plaintiff James Monroe, and against the defendant Edward Bray, we assess his damages in the sum of $1,000.

We, the jury, find in favor of the plaintiff James Monroe, and against the defendant Howard Pierson, and we assess his damages in the sum of $1,000.

We, the jury, find in favor of the plaintiff James Monroe, and against the defendant John Bosquette, and we assess his damages in the sum of $1,000.

We, the jury, find in favor of the plaintiff James Monroe, and against the defendant Edward Cagney - we assess his damages in the sum of $2,000.

We, the jury, find in favor of the plaintiff James Monroe, and against the defendant Frank Pape - we assess his damages in the sum of $5,000.

We, the jury, find in favor of the plaintiff, Flossie Monroe, and against the defendant Frank Pape - we assess her damages in the sum of $3,000.

We, the jury, find in favor of the defendant Frank Pape, and against the plaintiff James Monroe, Jr.

We, the jury, find in favor of the defendant Frank Pape, and against the plaintiff Robert Stevens.

We, the jury, find in favor of the defendant Frank Pape, and against the plaintiff Jacqueline Stevens.

We, the jury, find in favor of the defendant Frank Pape, and against the plaintiff Ralph Stevens.

We, the jury, find in favor of the defendant Frank Pape, and against the plaintiff Laurence Stevens.

We, the jury, find in favor of the defend[illegible] be and against the p[illegible] it on the verdi[illegible]

On defendant's [illegible] post-trial motions on Dec

Hand this memor[illegible]

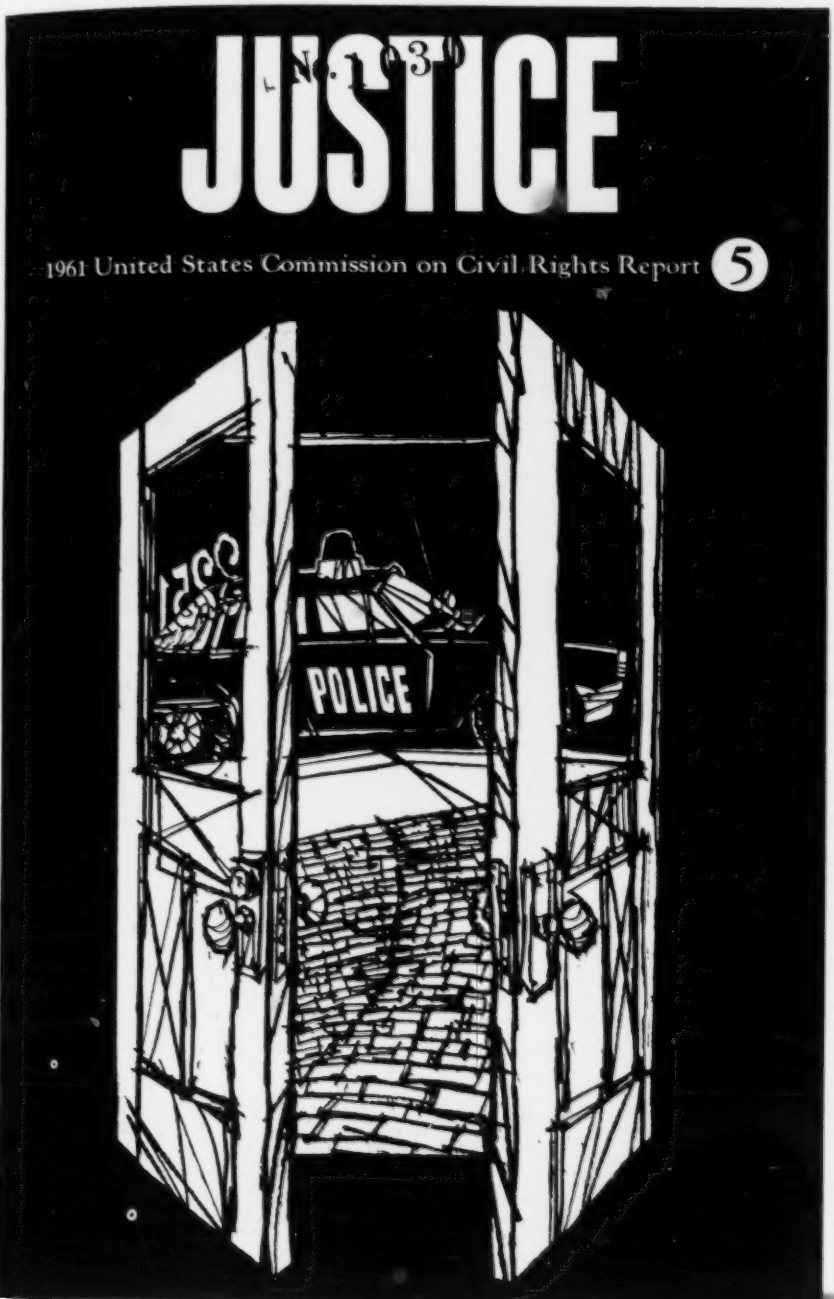
Counsel will not have to receive the

DEFENDANT'S EXHIBIT D

FILED

[illegible] OCLOCK
ELBERT A. WAGNER, JR.
CLERK

DEFENDANT'S EXHIBIT E.



2

BOOK 5

JUSTICE

1961 Commission on Civil Rights Report

Members of the Commission

JOHN A. HANNAH, *Chairman*
ROBERT G. STOREY, *Vice Chairman*
ERWIN N. GRISWOLD
THEODORE M. HESBURGH, C.S.C.
ROBERT S. RANKIN
SPOTTSWOOD W. ROBINSON, III

BERL I. BERNHARD, *Staff Director*

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C.

4

Foreword

The United States Commission on Civil Rights was created by the Civil Rights Act of 1957 as a bipartisan agency to study civil rights problems and report to the President and Congress. Originally created for a 2-year term, it issued its first comprehensive report on September 8, 1959.

On September 14, 1959, Congress extended the Commission's life for another 2 years. This is the fifth of five volumes of the Commission's second statutory report.

[ix]

* * * *

Part VII. Equal Justice Under Law

1. Introduction

The Commission has been disturbed by persistent reports of unconstitutional and violent acts by some agents of justice in the United States.

After an extensive review of these allegations and the entire field of administration of justice, the Commission authorized a study of three problems: (1) police brutality and related private violence; (2) the Civil Rights Acts and their enforcement; and (3) jury exclusion.

[1]

* * * *

6

2. Unlawful Police Violence

The Commission's study of the administration of justice concentrates on police brutality—the use of unlawful violence—against Negroes. Complaints and litigation suggest four subdivisions of the problem. The first involves the use of racially motivated brutality to enforce subordination or segregation. The second, a not altogether separate category, entails violence as a punishment. The third relates to coerced confessions. The last and largest entails the almost casual, or spontaneous, use of force in arrests. Only the first category necessarily involves racial discrimination. In the others it may, or may not, be present, but Negroes are the victims with disproportionate frequency.

In the text of this chapter the Commission briefly describes the alleged facts in 11 typical cases of police brutality. They are presented in the belief that they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions[1] or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in this study.

[5]

* * * *

PATTERNS OF POLICE BRUTALITY

Enforcement of segregation or subordinate status

[6]

* * * *

Punishment

[12]

* * * *

7

The third degree and coercion of confessions

[16]

* * * *

Initial contact and arrest

[18]

* * * *

Search, seizure, and violence: Chicago, 1958.—The Supreme Court of the United States decided the case of *Monroe* v. *Pape*[82] on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that:[83]

> . . . [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken

[20]

> to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.

[21]

* * * *

8

STATEMENT BY COMMISSIONER HESBURGH

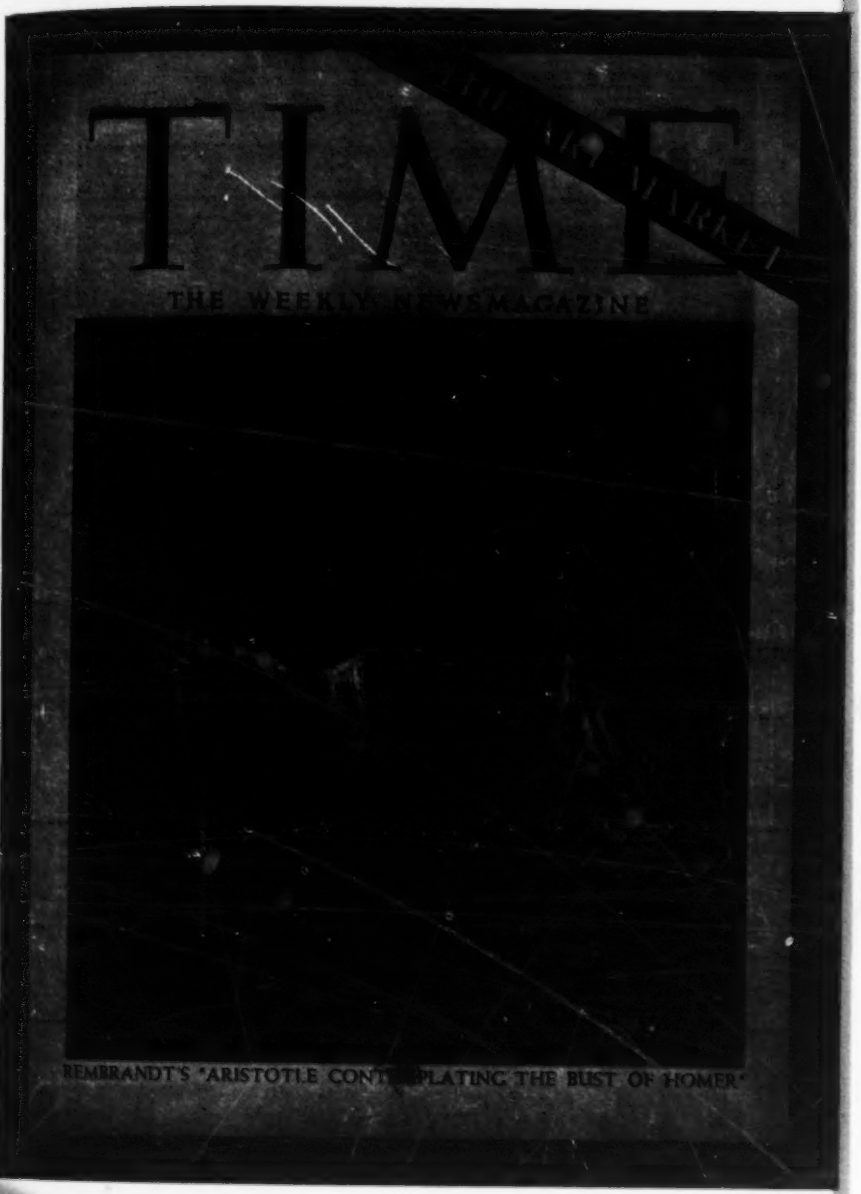
[166]

* * * *

Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world.

[168]

DEFENDANT'S EXHIBIT F.



long-term incumbent. Albert may have eager opposition. Dick Bolling, 45, is one possibility, and so is Alabama's Albert Rains, 59, a moderate who gets along well with both the party's Northern and Southern blocs in the House.

FOREIGN RELATIONS

Soapy Scratched

Since his appointment ten months ago as Assistant Secretary of State for African Affairs, onetime Michigan Governor G. Mennen Williams has made three trips to Africa, logged 75,000 miles pumping hands and poking into problems (and once getting poked on the jaw himself by an indignant white African). Last week Williams was up to his bow tie in Baedekers preparing for a fourth trip, when he suddenly canceled the safari because of "urgent business at home." In fact, the cancellation came on orders from State Secretary Dean Rusk, who is concerned by over-the-budget spending at Foggy Bottom, has ordered 500 positions eliminated as they become vacant. Under such circumstances, decided Rusk, Soapy Williams had done enough African sightseeing.

Help for Korea

With his stony expression, his dark glasses and dark civilian suits, the erect little man who flew into Washington last week sometimes looked like a bad 'un out of a foreign-intrigue movie. But Chung Hee Park, 44, the South Korean leader who normally wears the olive drab uniform of a four-star general, had little reason to smile, and he was keeping his military trappings out of sight for good purpose. His trip was aimed at winning Administration support for the military dictatorship he set up in South Korea last May with the avowed goal of rooting out the corruption and inefficiency that was smothering his nation.

The Kennedy Administration has little fondness for Park's military junta, which has dissolved the legislature, curbed freedom of the press, and taken an estimated 40,000 political prisoners (most of whom have been released). But with Communist pressure mounting in Asia, the U.S. badly needs a stable government in South Korea. Without U.S. support, General Park's government would soon topple—and the alternative might be far worse, said one U.S. official. "What we don't want is a never-ending stream of coups and colonels in South Korea."

Good Impression. As a result, the Kennedy Administration swallowed hard and warmly greeted the tough, austere soldier. Smiling broadly, Vice President Lyndon Johnson pumped General Park's hand on his arrival at the National Airport. Next morning, Park dutifully fulfilled the ritual of laying a wreath on the Tomb of the Unknowns, then talked with State Secretary Dean Rusk and Fowler Hamilton, head of the Agency for International Development. General Park outlined his five-year $2.4-billion plan for South Korea, indicated hopefully that he would like up to half of that sum to come from the U.S. Although Rusk and Hamilton made no promises and told him to rework his hastily drawn program, Park was assured that South Korea would continue to get considerable U.S. aid.

That day's lunch was the first chance that President Kennedy got to size up the general. He later invited his visitor into his office to continue their conversation, conducted through interpreters, for 1¾ hours. Although the session seldom got down to specifics, General Park promised the President that South Korea would hold elections and a constitutional referendum in 1963, assured him that he was working to improve South Korea's touchy relations with its old enemy, Japan. Kennedy came away favorably impressed with Park, willingly posed with him for pictures calculated to enhance the general's prestige back home.

"We Had To." In talks with Defense Secretary Robert McNamara, Park pressed for more military aid for his 600,000-man army, got promises of a review that would consider supplying modern communications equipment, antiaircraft guns, and perhaps jet planes.

Making a final pitch, General Park told the National Press Club: "We Koreans don't like military governments any more than you Americans. My military colleagues and I didn't want to make a military revolution. But we had to."

AP

SECRETARY RUSK & CHAIRMAN PARK
Better than a never-ending stream of coups and colonels.

CIVIL RIGHTS

Dawdling on the Corner

The new paperback book has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U.S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission.*

The bluntly frank report tells of a police officer, referred to only as "V," in Dawson, Ga., who arrested Negro James Brazier for speeding in November 1957. It quotes Brazier: "When I first entered the door of the jail, 'V' hit me on the back of the head and knocked me down and said, 'You smart son-of-a-bitch. I been wanting to get my hands on you for a long time.' I said, 'Why you want me for?' 'V' said, 'You is a nigger who is buying new cars and we can't hardly live. I'll get you yet.'" When Brazier was arrested again five months later by the same officer, Brazier's wife related: "'V' then said, 'I told you I would get you.' James said, 'What do you want to hurt me for? I ain't done nothing. I got a heap of little chilhun.' 'V' said, 'I don't give a goddam how many children you got, you're going away from here.' 'V' pulled out his pistol and stuck it against James's stomach."

Beaten to Death. Continues the report: "Brazier's ten-year-old son pleaded with the officers to stop beating his father and was knocked to the ground by 'V'; the victim was thrown onto the floor of the police car with his legs dangling outside. 'V' kicked him twice in the groin, slammed the car door on his legs, threw a hat full of sand into his bloody face, and

* Members of the scholarly panel: Chairman Dr. John A. Hannah, president of Michigan State University; Dr. Robert S. Rankin, chairman of Duke University's political science department; Robert G. Storey, former dean of the Southern Methodist University Law School; Sportswood W. Robinson 3rd, dean of Howard University Law School; Erwin N. Griswold, dean of Harvard Law School; the Rev. Theodore M. Hesburgh, president of Notre Dame University.

PAUL BERGEIUS—N. Y. DAILY NEWS

GALLO GANG'S FRANK ILLIANO, JOSEPH MUSUMECI AND ALBERT GALLO JR.
In their leader's image.

drove off." Brazier died five days later, and "Y" was never punished.

Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice*, "broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers." The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment.

Nursing & Flouting. The commission's report concedes that such cases may be "more dramatic than most," but it declares that police brutality is "a serious problem throughout the U.S." that Negroes suffer from it most, and that "there are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes." To remedy the situation, the commission recommends federal grants to upgrade state and local police forces, a federal law permitting police victims to sue local governments instead of only the officers who can seldom pay adequate judgments, and an amendment to federal law specifically banning police brutality and forced confessions.

Going beyond the report of the panel, Father Hesburgh issued a separate statement: "Personally, I don't care if the U.S. gets the first man on the moon if while this is happening on a crash basis we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world."

CRIME

Crazy Like a Clam

One of the meanest mobsters in the U.S. is a small, tight-lipped hood from Brooklyn named Joseph ("Crazy Joey") Gallo. In 1959, when he met Robert Kennedy, then counsel for Senator John McClellan's rackets-investigating committee, Crazy Joey examined Kennedy's office records and offered his professional opinion: "It would be nice for a crap game."

With the same sneering aplomb, Gallo last week went on trial in Manhattan on charges of trying to muscle in on a Brooklyn restaurant owned by one Theodore Moss. Not only did Gallo try to sell him $48,000 worth of stolen liquor, testified Moss, but he had demanded a cut of the business. As a persuader, said a detective, Gallo had threatened: "I'll put you in the hospital for a couple of months if you don't cut me in."

Throughout the three-day trial, Gallo refused to say a word in his defense, although he did allow himself a Cagney-like snarl at a haggle of assistant district attorneys. "Ya dirty rats!" he observed. The jury quickly found Gallo guilty of attempted extortion and conspiracy. The finding, his first major conviction, could get Gallo up to 14½ years in Sing Sing when he is sentenced next month.

While Crazy Joey was on trial, the cops rounded up 14 members of the vending-machine racketeering mob that he had organized in Brooklyn, including his father, Albert Gallo, his two brothers, Larry Gallo and Albert Gallo Jr., and such assorted fish as Joseph Musumeci, Larry ("Big Lollypop") Carna, Joseph ("Little Lollypop") Carna and Frank ("Punchy") Illiano. The cops made the arrests—the technical charge was consorting with criminals, that is, each other—after word got around that the Gallo mob was about to declare a shooting war on a rival Brooklyn gang headed by an olive oil distributor named Joseph Profaci, who stands high enough in the underworld to have attended the convention of hoods in Apalachin, N.Y., in 1957. True to their leader's image, the Gallo mobsters laughed off their arrests (*see cut*).

Crazy Joey Gallo's imminent trip up the river leaves unsettled two puzzling attacks on members of his mob: Who tried to garrote Larry Gallo in a Brooklyn tavern in August, and who shot a Gallo lieutenant, Joseph Magnasco, in October? If the Gallo gangsters know, they are not talking. As an explanation to the boys about why Crazy Joey had clammed up before the jury, the Brooklyn headquarters of the mob is festooned in locker room fashion with inspirational signs: "Don't talk—the life you save may be your own."

Chicago Slaughter

"A falling out among thieves" was the way Chicago's Police Superintendent Orlando W. Wilson put it. In fact, it was more of a falling down of bodies. Six members of Chicago's underworld were killed in just ten days, a rate of extinction that compared favorably with that of the '20s, when Al Capone was lord high executioner and the Thompson submachine gun was known affectionately as the Chicago piano.

Gaudiest of all the murders was that of Albert Testa, a midget-model (4 ft. 6 in.) burglar, counterfeiter and gambler, who was shot twice and dumped into a West Side alley. Testa was a friend of the late William ("Action") Jackson, a 300-lb. "juice man" (a collector of loans for gangland usurers known as "juice dealers"), who was tortured to death and stuffed into the trunk of his Cadillac last August. Testa, 48, had also been romancing an 18-year-old, green-eyed stripper who moonlighted as a police informer, picked up her lowdown by keeping her ears open as she took her clothes off at command performances before mobmen in the Cicero and Franklin Park motels.

In addition to the versatile Testa, the death list included some burglars, a thief, and a suspected juice dealer. Since the killings began, the possibility that they may fit into a master plan of thugicide has fascinated Chicago, a town that has

UNDERWORLD'S TESTA
In a short bier.

DEFENDANT'S EXHIBIT G.

(Filed Mar 6 - 1969)

UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington 25, D. C.

Information Office
STerling 3-0860, Ext. 3488

For Release Friday A.M. Papers
November 17, 1961

FINDINGS AND RECOMMENDATIONS ON ADMINISTRATION OF JUSTICE

(including findings on a study of the American Indian)

Contained in the Fifth Volume of the Commission's Five-Volume 1961 Report to the President and Congress Caution: Release restriction applies to radio and television commentators and announcers as well as to the press. Extreme care must be exercised to avoid premature publication.

EQUAL JUSTICE UNDER LAW.

CONCLUSIONS.

There is much to be proud of in the American system of criminal justice. For it is administered largely without regard to the race, creed, or color of the person involved. Most officials at all levels attempt to perform their duties within the bounds of constitutionality and fairness. Most policemen never resort to brutality, thus providing constant proof that effective law enforcement is possible without brutality. And the great majority of American

policemen have an excellent record of successfully discouraging mob violence against minority group members. This record shows that policemen who make it clear that they will not tolerate vigilante violence can prevent that violence.

Unfortunately, this is not the whole story. The Commission is concerned about the number of unconstitutional and criminal acts committed by agents of American justice who are sworn to uphold the law and to apply it impartially. Perhaps the most flagrant of those acts is the illegal use of violence. Indeed, a comprehensive review of available evidence indicates that police brutality is still a serious and continuing problem.

When policemen take the law into their own hands, assuming the roles of judge, jury, and, sometimes, executioner, they do so for a variety of reasons. Some officers take it upon themselves to enforce segregation or the Negro's subordinate status. Brutality of this nature occurs most often in those places where racial segregation has the force of tradition behind it. Other types of unlawful official violence are unrelated to race or region. In Florida's Raiford Prison, recently, guards took the occasion of minor rules infractions to subject prisoners of both races to inhuman treatment. Perhaps the most frequent setting for brutality is found in the initial contact between an officer and a suspect. The fact that an officer approaches a private citizen and seeks to question him, to search him, or to arrest him, creates a tense situation in which violence may erupt at any moment. The use of brutality to coerce confessions appears to be diminishing but has not disappeared.

Complete statistics on the subject of police brutality are not available, but the Commission's comprehensive survey of records at the Department of Justice suggests that although whites are not immune, Negroes feel the brunt of

official brutality, proportionately, more than any other group in American society.

The Commission has been concerned with another serious (although far less widespread) dereliction of duty by American police officers—condonation of or connivance in private violence. Although this practice appears to be on the wane, it has not been totally abandoned. The most recent victims were the "Freedom Riders" in Alabama. There are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes.

On the other hand, it is encouraging for the Commission to report that lynching, another form of mob violence which frequently involved police assistance, may be extinct. Yet, the threat lives on in the memory of many Negroes.

While the discriminatory exclusion of Negroes and other minority groups from juries has diminished during the past century, this badge of inequality persists in the judicial systems of many southern counties.

By and large, frustration and defeat face the victim of these unconstitutional practices who seeks redress—for he rarely is able to obtain immediate or effective relief. A victim of these unconstitutional practices may bring action in a State court to recover money damages from the brutal policeman. The record indicates that the prospects for a verdict for the complainant in such suits are greater than in other forms of court action either at the Federal or State level. However, most victims do not commence legal action against brutal policemen, and one of the severe drawbacks of such litigation is that even if a plaintiff overcomes the difficulties of trial and is awarded a money judgment, most municipalities are not liable for their officers' misconduct, and the policemen themselves rarely have funds to satisfy a substantial money judgment.

The victim of brutality may also request a local prosecutor to bring criminal action in a State court against the policemen. For policemen, like ordinary citizens, are subject to criminal penalties ranging from jail or fines for simple assault and battery up to the death penalty for first degree murder. Such prosecutions may have a deterrent effect on police misbehavior, but they are rare.

In addition to these State and local avenues of redress there are the Federal Civil Rights Acts, providing both civil and criminal remedies. But suits in Federal courts under these Acts are few and usually unsuccessful. The civil statutes offer the advantage of allowing the victim himself to commence action for money damages against officers who have violated his constitutional right. In a recent 2-year period, however, only 42 Federal civil suits were filed based on police brutality allegations, and none of them were successful. In a recent 2½-year period the Department of Justice authorized criminal prosecutions in 52 police brutality matters. During the same period, six prosecutions were successful. It is probable that during these periods thousands of acts of brutality were committed in this country.

There are certain inherent difficulties in suits which seek redress for acts of violence. The victim is often ignorant of remedies for police misconduct and loath, because of lethargy or fear, to report violations to responsible authorities. Even where suit is brought, there are obstacles to successful prosecution. There are frequently no witnesses and little concrete evidence to corroborate the complainant's story; the police officer usually makes a more believable witness than the complainant; and the jury is often hostile to a civil rights suit in Federal court against a local policeman. The Commission believes, however, that the Department of Justice by taking the initiative in seeking out information and, in appropriate cases,

by instituting prosecutions ight make the Federal Civil Rights Acts more effective struments—despite these inherent difficulties.

Victims of civil rights vio tions sometimes assume that Federal officers are closely linked with local policemen. They may, therefore, be rel tant to report unlawful violence or sign complaints. Th y fear that complaints either will be useless or will res t in retaliation by the local policemen. It is, of course, sential that the FBI have the cooperation of thousands o local policemen to carry out its investigative mission un r a long list of Federal criminal statutes not related to ivil rights. Investigations of police brutality complaints may, therefore, place FBI agents in an exceedingly dicate position.

The Department of Justi policy of deference to State authorities is another probln in Civil Rights Acts prosecutions. When State autho ties takes steps to prosecute local law officers for acts f brutality, the Civil Rights Division of the Departmer suspends both investigation and prosecution. While is practice may satisfy the States, where State action roves ineffective, Federal investigation and prosecution has sometimes been made impractical by the passage of ime.

When such a case does get into court, United States Attorneys represent the Fe eral Government. Some United States Attorneys have dis layed unfamiliarity with the complex case law that has eveloped around the Federal Civil Rights Acts. Indeed, few attorneys have displayed open hostility to Civil Rigts Acts prosecutions.

There may also be oth r difficulties in obtaining an indictment. Grand juries i some places refuse to return indictments under the Civi Rights Acts even in the most heinous of cases; in a rec t 2½-year period grand juries refused to indict in at lea 16 of the 43 police brutality cases the Department of ustice filed in court. But the

grand jury is not a necessary step. The Federal Government prosecutes brutal officers under section 242 of the United States Criminal Code, and since that statute defines only a misdemeanor, action may be taken by way of information (a sworn statement setting out the specific charges against the defendant) as well as by grand jury indictment. Prosecution was initiated by information in one case, brought in the early 1940's. It was successful.

Other difficulties in the prosecution of Federal criminal suits under the Civil Rights Acts arise from the 16-year-old Supreme Court decision in *Screws* v. *United States*. It was there held that to sustain a prosecution under section 242 the Government had to prove that the officers had the "specific intent" to violate the constitutional rights of the victim. If the officers merely had the general criminal intent to hurt him, the Supreme Court explained, this would not be sufficient for a conviction under the Federal statute. This requirement is onerous. It accounts for some of the hesitancy of the Department of Justice to authorize prosecutions, and of juries to render guilty verdicts. Remedial action by Congress is necessary to make Federal criminal prosecutions effective deterrents to unlawful police violence.

The most important remedies for improper police practices, however, lie in preventive measures on the local level. There is concrete evidence that when a police commander indicates that he will not tolerate brutality or other illegal practices, these practices cease. Atlanta and Chicago, among other cities, provide examples of how positive and enlightened leadership in the police department can reduce the incident of unlawful police violence. By the same token, the available evidence indicates that some policemen have interpreted permissive leadership as a license for brutality. Leadership may also have an impact on private violence with police connivance, as

dramatically illustrated by recent events in Alabama and conversely, by the less dramatic but positive work of community leaders in Atlanta and, subsequent to the 1957 disturbances, in Little Rock.

Proper recruit selection standards may also reduce police misconduct. Such standards are nonexistent in some departments; others are attempting improvement of psychological tests to weed out those recruits prone to violence. Training programs in human relations and in scientific police techniques are also important factors in the prevention of violent invasions of rights by policemen.

In 1880 the Supreme Court declared for the first time that the discriminatory exclusion of otherwise qualified citizens from jury panels was a violation of the equal protection clause of the 14th amendment. In the ensuing years the Supreme Court has reiterated that ruling time and time again. It is also a Federal crime for any official to disqualify a citizen for jury service because of his race, color, or previous condition of servitude. One of the Civil Rights Acts (section 243) passed in 1875 makes such action punishable by a fine of $5,000. But in some counties the practice of jury exclusion is an enduring institution, and the initiative for challenging this patently unconstitutional practice has been left by default to private citizens. Apparently, the Department of Justice has brought only one successful section 243 prosecution, and this was in the late 1870's. The jury exclusion issue is raised most often by Negro defendants convicted by all-white juries. Recently, however, a colored citizen of McCracken County, Kentucky, sought an injunction under one of the Civil Rights Acts to prevent jury officials from excluding Negroes. This action apparently has resulted in the elimination of unconstitutional jury exclusion in that county.

There can be no reasonable dissent to the proposition

that all Americans, regardless of race, creed, color, or national origin, are entitled to equal justice under law. Police brutality, connivance in private violence, and exclusion of minorities from jury service violate ideals of fair play fundamental to a free society. All three are contrary to our Constitution and our heritage.

FINDINGS

Unlawful official violence

1. The actions of most policemen demonstrate that effective law enforcement is possible without the use of unlawful violence.

2. Nonetheless, police brutality by some State and local officers presents a serious and continuing problem in many parts of the United States. Both whites and Negroes are the victims, but Negroes are the victims of such brutality far more, proportionately, than any other group in American society.

3. While police connivance in violence by private persons is becoming less of a problem than in the past, such denials of equal protection still occur.

4. American citizens in some places live in fear of police violence and of mob violence with police connivance.

5. State and local officials—police commanders, prosecutors, and others in positions of authority—who have the immediate responsibility and most effective means for preventing such abuses sometimes do not use their powers. Police commanders at times take a protective attitude toward miscreant officers, and local prosecutors rarely bring criminal actions against them.

The professional quality of State and local police forces

6. The most effective "remedies" for illegal official violence are those that tend to prevent such misconduct rather than those which provide sanctions after the fact.

The application of professional standards to the selection and training of policemen is one such preventive measure.

7. Complaints rarely are made against Federal police agents, in part because these officers have had professional training and have been selected according to professional standards.

8. The professional level is high in some State and local police forces also, but in many others it is low due to low pay, ineffective recruit selection standards and ineffective training programs.

9. The establishment of professional standards for police forces can be aided by such positive programs as good pay, high recruit selection standards, and training in scientific crime detection, in human relations, and in police administration. These programs would be encouraged by Federal financial assistance to police departments that seek the development of more effective selection standards and training courses.

Federal criminal remedies for unlawful official violence

10. Although many acts of violence by policemen are violations of constitutional rights and of Federal statutes, the Federal criminal sanctions for such misconduct have not proved to be effective remedies. This is due to difficulties inherent in the cases such as the problem of proof; to the policies and procedures of the Department of Justice; and to weaknesses of the statutes.

11. Among the policies and procedures of the Department of Justice that have hampered Federal criminal prosecutions for unlawful official violence have been excessive reliance on signed complaints from aggrieved individuals despite the fact that many victims of police misconduct are unaware of their rights, or fearful to press them; a tendency to close some cases without complete investigation; and deference to State authorities which

results in withholding any investigation pending State action even at the risk of allowing evidence to grow stale.

12. FBI agents, charged with the duty of Civil Rights Acts investigations, are sometimes placed in a difficult position when they must investigate allegations of misconduct against local policemen. The cooperation of local officers is essential to the FBI in investigating and apprehending those who violate Federal criminal statutes not related to civil rights. Moreover, victims and witnesses of police misconduct are sometimes hesitant to give information to Federal authorities because of the cooperative relationship between the FBI and local policemen.

13. Since section 242, the principal criminal Federal Civil Rights Act, defines only a misdemeanor, prosecution can be instituted by information (a sworn statement setting out the specific charges against the defendant) as well as by grand jury indictment. The former method avoids the delay and the hazard of one or more hostile jury involved in a presentment to a grand jury, and allows the facts to be brought to the attention of the affected community in a public trial. An information has been used by the Department of Justice only once and then successfully.

14. Difficulties also arise from the language of section 242, as interpreted by the Supreme Court in *Screws* v. *United States*. The requirement of "specific intent"— as opposed to the usual general criminal intent—for conviction under the statute severely limits the statute's applicability. Moreover, there is confusion among judges, jurors, and lawyers as to the meaning of "specific intent." Some Federal trial judges have issued instructions to juries which seem to interpret "specific intent" more narrowly than is required by the *Screws* decision.

15. A more specific statute supplementary to section

242 spelling out certain conduct proscribed by the 14th Amendment would more effectively protect the constitutional right to security of the person against official misconduct.

Federal civil remedies for unlawful official violence

16. The Federal Civil Rights Acts providing civil liability for unlawful official violence have not proved to be effective remedies. Relatively few suits are filed under the principal civil statute, section 1983, which allows suits by the victims of police brutality against officers for monetary damages. Successful suits are rare.

17. One deterrent to the filing of civil suits is the fact that even if a victim of official violence sues successfully, few police officers are able to satisfy a substantial money judgment. This can be corrected by an amendment to section 1983 which would render counties, cities and other local governmental entities liable for the misconduct of their policemen.*

Discriminatory exclusion of minority groups from jury service

18. The practice of excluding Negroes from juries on account of their race still persists in a few States. The burden of combating such racial exclusion from juries now rests entirely on private persons—almost invariably defendants in criminal trials.

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* *Lincoln County* v. *Luning*, 133 U. S. 529 (1890); *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911); *Frame v. City of New York*, 34 F. Supp. 194 (S. D. N. Y. 1940). Some States have statutes providing that the victims of mobs may sue the State in local courts for damages so incurred. An example is Ill. Rev. Stat., ch. 38, secs. 512-517 (1959). It is doubtful if liability could be extended by Congressional action to State governments. *Hans* v. *Louisiana*, 134 U. S. 1 (1890); *Palmer* v. *Ohio*, 248 U. S. 32, 34 (1918); *In re State of New York*, 256 U. S. 490, 497 (1920); *Monaco* v. *Mississippi*, 292 U. S. 313, 328-30 (1934).

19. Only criminal remedies are available to the Federal Government to combat unconstitutional jury exclusion. The Federal Government has successfully invoked a criminal statute only once, in the late 1870's.

20. Civil actions instituted in the name of the United States would constitute a more effective method of preventing discriminatory exclusion from juries.

RECOMMENDATIONS

The professional quality of State and local police forces

Recommendation 1.—That Congress consider the advisability of enacting a program of grants-in-aid to assist State and local governments, upon their request, to increase the professional quality of their police forces. Such grants-in-aid might apply to the development and maintenance of (1) recruit selection tests and standards; (2) training programs in scientific crime detection; (3) training programs in constitutional rights and human relations; (4) college level schools of police administration; and (5) scholarship programs that assist policemen to receive training in schools of police administration.

Federal criminal remedies for unlawful official violence

Recommendation 2.—That Congress consider the advisability of enacting a companion provision to section 242 of the United States Criminal Code which would make the penalties of that statute applicable to those who maliciously perform, under color of law, certain described acts including the following:

(1) Subjecting any person to physical injury for an unlawful purpose;

(2) subjecting any person to unnecessary force during the course of an arrest or while the person is being held in custody;

(3) subjecting any person to violence or unlawful restraint in the course of eliciting a confession to a crime or any other information;

(4) subjecting any person to violence or unlawful restraint for the purpose of obtaining anything of value;

(5) refusing to provide protection to any person from unlawful violence at the hands of private persons, knowing that such violence was planned or was then taking place;

(6) aiding or assisting private persons in any way to carry out acts of unlawful violence.

Federal civil remedies for unlawful official violence

Recommendation 3.— That Congress consider the advisability of amending section 1983 of title 42 of the United States Code to make any county government, city government, or other local governmental entity that employs officers who deprive persons of rights protected by that section, jointly liable with the officers to victims of such officers' misconduct.

Exclusion of minority group members from jury service

Recommendation 4.—That Congress consider the advisability of empowering the Attorney General to bring civil proceedings to prevent the exclusion of persons from jury service on account of race, color, or national origin.

U. S. Commission on Civil Rights

Washington 25, D. C.

CCR #150

For Release Friday A.M. Papers
November 17, 1961

The Commission on Civil Rights today issued the fifth and final volume of its 1961 Report, which included a survey of the Administration of Justice, a study of the problems of American Indians, a recommendation for the exercise of Presidential leadership, and a separate statement by the Reverend Theodore M. Hesburgh, Commissioner, urging that all Americans make the problem of civil rights a matter of "personal concern." (Previous volumes dealt with voting, education, housing and employment.)

In the Justice Report, the Commission surveyed three subjects: police brutality and related private violence; the enforcement of the Civil Rights Acts; and exclusion of persons from juries for racial reasons. Although the Commission concluded that most policemen and public officials follow the rules of fair play and constitutionality, it termed brutality by some state and local officials "a serious and continuing problem in many parts of the United States." The Commission found deprivations of constitutional rights through police connivance in private violence. It also concluded that racial exclusion from jury service is a persistent problem in certain areas in the south.

The Commission called upon Congress to enact a 4-part legislative program aimed at preventing or deterring invasions of constitutional rights:

• a program of grants-in-aid to assist state and local governments to bolster the professional quality of their police forces.

• amendment of existing Federal criminal law to remove some of the legal difficulties which now hamper Federal prosecution in police brutality cases.

• amendment to existing Federal civil remedies to render local governments liable for the misconduct of police officers.

• a grant of authority to the Attorney General to seek injunctions against the exclusion of persons from jury service for racial reasons.

All four recommendations were unanimous.

* * * * *

In its concluding section to the whole report, the Commission found that despite "substantial progress," there were still barriers to the achievement of equal opportunity. Finding racial problems in voting, education, housing, employment and the administration of justice interrelated, it said that "no single limited approach will bring an end to discrimination." Thus, the Commission called for a variety of Federal remedies and summarized the recommendations in its 5-volume report as involving (1) new laws to enforce the Constitution, (2) the withholding of public money from discriminatory activities and its use to encourage equal opportunity, and (3) the exertion of leadership by the President and others.

The new recommendation dealt with leadership, calling upon the President to utilize his "influence and the prestige of his office in support of equal protection of the laws," by reiterating his support of the Supreme Court's desegregation decisions, stimulating the exercise of the right to vote, and "explaining to the American people the legal and moral issues involved in critical situations when they arise . . ."

While noting that its responsibility was only to make recommendations to the Federal Government, the Commission suggested that there was a similar need for leadership

by local governments, private organizations and individuals. In his separate statement, Father Hesburgh expanded this theme, saying the problem "needs the conviction of every American, of every walk of life, in every corner of America."

"Personally," Father Hesburgh wrote, "I don't care if the United States gets the first man on the moon if, while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world."

* * * * *

In its Indian study, the Commission reported some evidence of discrimination against American Indians in the administration of justice, housing, employment, public welfare and, in some instances, education. It found that by and large Indians are free to register and vote without restriction. The Commission also noted a number of Indian problems outside its jurisdiction, e.g. "home rule" on reservations, concern about the loss of tribal lands, fear that the Federal Government may end its trusteeship, and the need for economic development. Because of the limited scope of the Commission's investigation, it did not make specific recommendations. It did indicate, however, that most of the recommendations made elsewhere in the report would, if adopted, serve Indians as well as others.

In the Justice Report, the Commission found that Federal criminal and civil statutes had not provided effective redress against violence. It attributed the lack of successful suits (6 in a recent 2½ year period) to problems of proof inherent in police brutality cases and legal weaknesses in the Civil Rights Act. In addition, the Report said, certain policies of the Department of Justice, notably the requirement of signed complaints and the withholding of investiga-

tion in deference to State authorities, also hampers criminal prosecutions.

State court remedies, the Commission found, are potentially more effective because subject to fewer restrictions, but are infrequently used. Citing programs undertaken by the Chicago and Atlanta police departments and by the F.B.I. the Commission concluded that firm leadership and the application of professional standards in selecting and training policemen are the most effective devices to prevent misconduct, and it urged Federal grants-in-aid to extend such programs.

The Report concluded that police connivance in private violence is becoming less of a problem than in the past and that lynchings have all but disappeared. On the other hand, the Commission said that "there are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes."

The Commissioners are:

Dr. John A. Hannah, Chairman
Robert G. Storey, Vice Chairman
Rev. Theodore M. Hesburgh, C.S.C.
Dean Erwin N. Griswold
Dr. Robert S. Rankin
Dean Spottswood W. Robinson III

DEFENDANT'S EXHIBIT H.

THE NEW YORK TIMES, FRIDAY, NOVEMBER 10, 1961.

RIGHTS UNIT ASKS CURBS ON POLICE

Finds Brutality Widespread —Urges New Legislation and Executive Action

Excerpts from commission's report are on Page 22.

By ANTHONY LEWIS
Special to The New York Times.

WASHINGTON, Nov. 10—The Civil Rights Commission reported today that police lawlessness and brutality remained "a serious problem throughout the United States." It recommended corrective action by both Congress and the Kennedy Administration.

A commission study of the administration of justice described beatings and even killings by the police in a number of states in recent years. It drew this conclusion, among others:

Although whites are not immune, Negroes feel the brunt of official brutality, proportionately, more than any other group in American society."

Findings Unanimous

The six commissioners were unanimous in their findings and recommendations. They urged the Justice Department to bring "serious" to prosecuting local policemen who violated the Constitution.

The commissioners also asked Congress to consider this new legislation:

A program of grants in aid to state and local governments to improve their police forces by better recruiting and training.

An amendment to the Federal criminal statute that now prohibits constitution[al] acts by local officers. The amendment would provide specific bans on police brutality, the

Continued on Page 22, Col. [illegible]

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RIGHTS UNIT ASS CURBS ON POLCE

Continued from Page 1

covering of confessions [illegible] in action in the face of victim.

An amendment to [illegible] Federal Civil Rights Act [illegible] citizens injured by offic[illegible] conduct recover direct[illegible] from local governments, [illegible] major new suit publicly or other officials, but there [illegible] little chance of collecting [illegible].

A new statute to [illegible] Justice Department bri[illegible] civil suits to end racial discrimination in the selection of [illegible] juries.

The commission said that exclusion of Negroes from juries because of race [illegible] a Federal crime since 1[illegible]. But it said discrimination [illegible] it pointed especially [illegible] commission in the Deep South, heavily Negro in population, where it said no Negro had ever served on a grand jury or trial jury.

The usual method of [illegible] jury discrimination is to raise the issue in the initial trial of a Negro. But the commission said it was often difficult or even dangerous for a lawyer to make that contention in a hostile atmosphere. It urged that the Justice Department share the burden of [illegible] ment.

The commission [illegible] over-all that "there is much to be proud of in the American system of criminal justice," it said, most policemen acted [illegible] and lawfully. But it warned:

"Unfortunately, this is not the whole story. The commission is concerned about the number of unconstitutional and unlawful acts committed by agents of American justice who are sworn to uphold the law and apply it impartially."

Alabama Beatings Cited

In addition to police [illegible] ality, the report said there was [illegible] through [illegible], including [illegible] which the police stood [illegible] special citizens were [illegible] ed to violence. It cited [illegible] counts on the Freedom [illegible] Alabama last spring in [illegible] ence of policemen.

The report also [illegible] a separate preliminary [illegible] the status of American [illegible].

Most Indians, the [illegible] found, are free to vo[illegible] said some children [illegible] excluded from public [illegible] cause of race and [illegible] that the Justice or [illegible] partment take legal [illegible] against such discrimination.

"Employment opportunities appear to be as restricted [illegible] Indians as they are [illegible] groups," the commission said.

The entire report, entitled "Justice," was the fifth and last volume of the commission's studies of 1961. Others dealt with voting, schools, housing and jobs.

At the end of today's report the commission made some general observations on the five volumes and on the state of civil rights.

Among other things, it called on President Kennedy to exert his leadership by "explaining to the American people the legal and moral issues involved in critical situations when they arise," by reiterating his support for desegregation of schools and by urging citizens to exercise their voting rights.

Statement by Hesburgh

One member of the commission, the Rev. Theodore M. Hesburgh, president of the University of Notre Dame, issued a strongly worded separate statement.

"We are all excited about Communist subversion," he said, "while we perpetrate a much worse and studied subversion of our own Constitution that corrodes the nation at its core and central being—the ideal of equal opportunity for all."

The other members of the commission are Dr. John A. Hannah, president of Michigan State University, the chairman; Robert G. Storey of Dallas, vice chairman; [illegible] Rankin, executive director; [illegible] Carl Rowan, Assistant Attorney General; Dr. Frankfurter, Professor of Law at Harvard University Law School and Dean Erwin N. Griswold of Harvard Law School.

The report describes a number of incidents of police brutality. Some of the cases follow, as reported by the commission.

In 1959 James Brazier, a Negro of Dawson, Ga., died after a beating by the police. No reason was given for his arrest, but witnesses said the police had resented his prosperity and had told him:

"You is a nigger who is buying new cars and we can't ridely live."

Sheriff Is Quoted

A year after Mr. Brazier's death the county's sheriff allegedly told his widow, who arrived with four children:

"I oughta chop your damn brains out. A nigger like you I feel like stepping them out. You niggers get around here and look at television and go up North and do to white folks here like the niggers up North do, but you ain't gonna do it."

The Justice Department presented a grand jury presented evidence for five days and requested indictments against three of the Dawson police officers. The grand jury, made up of local citizens, refused to indict.

A retired Negro policeman in Detroit, Jesse Ray, told the commission what had happened to him when he waved at two white officers who were parked in a car as he drove by. They did not recognize him as a former policeman.

The white officers stopped him, apparently interpreting the wave as an insult. They pulled him out of the car, hit him on the head with a blackjack, choked him, knocked him to the ground and handcuffed his hands behind him. He was arrested and taken to a hospital where he was shackled to a bed all night and not allowed to call a lawyer.

Mr. Ray was charged with reckless driving. A jury acquitted him. No action was taken against the officers.

Magnuson (Civil Rights)

THE NEW YORK TIMES, FRIDAY, NOV. 17, 1961

Excerpts From Civil Rights Unit's Report and Statement by Hesburgh

Special to The New York Times

WASHINGTON, Nov. 16—Following are excerpts from a report issued by the Civil Rights Commission today on the administration of justice in the United States and excerpts from a separate statement by the Rev. Theodore M. Hesburgh, president of the University of Notre Dame, a member of the commission:

Findings

1. The actions of most policemen demonstrate that effective law enforcement is possible without the use of unreasonable force.

2. Nonetheless, police brutality by some state and local officers presents a serious and continuing problem in many parts of the United States. Both whites and Negroes are the victims, but Negroes are the victims of such brutality far more disproportionately than any other group in American society.

3. When police dominance in violence by private persons is becoming less of a problem than in the past, such denials of equal protection still occur.

4. American citizens in some places live in fear of police violence and of mob violence with police connivance.

5. State and local officials—police commanders, prosecutors, and others in positions of authority—who have the immediate responsibility and most effective means for preventing such abuses sometimes do not use their powers. Prior commitment at times calls a police force into action toward miscreant officers, and local prosecutors rarely bring criminal actions against them.

Police Training Noted

6. The most effective "remedies" for illegal official violence are those that tend to prevent such misconduct rather than those which provide sanctions after the fact. The application of professionally standards by police administrators is the strongest deterrent to such practices.

7. Complaints rarely are made against Federal police agents. In part because these officers have had professional training and have been selected according to professional standards.

8. The professional level is high in some state and local police forces also, but in many others it is low due to low pay, ineffective recruit selection standards and ineffective training programs.

9. The establishment of professional standards for police forces can be aided by such positive programs as good pay, high recruit selection standards and training in scientific crime detection, in human relations and in police administration. These programs would be encouraged by Federal financial assistance to police departments that seek the development of more effective selection standards and training courses.

Violence Unchecked

10. Although many acts of violence by policemen are violations of constitutional rights and of Federal statutes, the Federal criminal sanctions for such misconduct have not proved to be effective remedies. This is due to difficulties inherent in the cases such as the problem of proof; to the policies and procedures of the Department of Justice; and to weaknesses of the statutes.

11. Among the policies and procedures of the Department of Justice that have hampered Federal criminal prosecutions for unlawful official violence have been excessive reliance on [illegible] aggrieved individuals, the fact that many victims of police misconduct are unaware of their rights, or unwilling to press them, a tendency to close some cases [illegible] complete investigation; and deference to state authorities which results in withholding any investigation pending state action even at the risk of allowing evidence to grow stale.

12. F. B. I. agents, charged with the duty of civil rights acts investigations, are sometimes placed in a difficult position when they must investigate allegations of misconduct against local policemen. The cooperation of local officers is essential to the F. B. I. in investigating and apprehending those who violate Federal criminal statutes not related to civil rights. Moreover, victims and witnesses of police misconduct are sometimes hesitant to give information to Federal authorities because of the cooperative relationship between the F. B. I. and local policemen.

13. Since Section 242, the principal criminal Federal civil rights act, defines only a misdemeanor, prosecution can be instituted by information (a sworn statement setting out the specific charges against the defendant) as well as by grand jury indictment. The former method avoids the delay and the hazard of one more hostile jury, involved in a presentment to a grand jury, and allows the facts to be brought to the attention of the affected community in a public trial. As information has been used by the Department of Justice only once and then unsuccessfully.

ATTACKS RACIAL BIAS: The Rev. Theodore M. Hesburgh, president of University of Notre Dame, and a member of the Civil Rights Commission. He issued a statement in addition to report made by the panel.

14. Difficulties also arise from the language of Section 242, as interpreted by the Supreme Court in Screws v. United States. The requirement of "specific intent" — as opposed to the usual general criminal intent — for conviction under the statute severely limits the statute's applicability. Moreover, there is confusion among judges, jurors and lawyers as to the meaning of "specific intent." Some Federal trial judges have issued instructions to juries which seem to interpret "specific intent" more narrowly than is required by the Screws decision.

15. A more specific statute supplementing Section 242 spelling out certain conduct proscribed by the Fourteenth Amendment would more effectively protect the constitutional right to security of the person against official misconduct.

Civil Remedies Detailed

16. The Federal civil rights acts providing civil liability for unlawful official violence have not proved to be effective remedies. Relatively few suits are filed under the principal civil statute, Section 1983, which allows suits by the victims of police brutality against officers for monetary damages. Successful suits are rare.

17. One deterrent to the filing of civil suits is the fact that even if a victim of official violence [illegible] few police officers [illegible] judgment. This can be corrected by an amendment to Section 1983 which would require counties, cities and other local governments to

THE NEW YORK TIMES, FRIDAY, NOVEMBER 17, 1961

(Continued)

[redacted] rights for the advancement of their colleagues.

18. The practice of excluding Negroes from juries will decrease as a few states. The formulation of combatting such discrimination from juries now rests entirely on private persons—almost invariably defendants in criminal trials.

19. Only criminal remedies are available to the Federal Government to combat unconstitutional jury exclusion. The Federal Government has successfully invoked a criminal statute only once, in the late Eighteen Seventies.

20. Civil actions instituted in the name of the United States would constitute a more effective method of controlling discriminatory exclusion from juries.

Recommendations

That Congress consider the advisability of enacting a program of grants-in-aid to assist state and local governments, upon their request, to increase the professional quality of their police forces. Such grants-in-aid might apply to the development and maintenance of (1) recruit selection tests and standards; (2) training programs in scientific crime detection; (3) training programs in constitutional rights and human relations; (4) college-level schools of police administration; and (5) scholarship programs that assist policemen to receive training in schools of police administration.

That Congress consider the advisability of enacting a companion provision to Section 242 of the United States Criminal Code which would make the penalties of that statute applicable to those who deliberately perform, under color of law, certain described acts [illegible] the following:

(1) Subjecting any person to physical injury for an unlawful purpose;

(2) Subjecting any person to unnecessary force during the course of an arrest or while the person is being held in custody;

(3) Subjecting any person to violence or unlawful restraint in the course of eliciting a confession to a crime or any other information;

(4) Subjecting any person to violence or unlawful restraint for the purpose of obtaining anything of value;

(5) Refusing to provide protection to any person from unlawful violence at the hands of private persons, knowing that such violence was planned or was then taking place;

(6) Aiding or assisting private persons in any way to carry out acts of unlawful violence.

That Congress consider the advisability of amending Section 1985 of Title 42 of the United States Code to make any county government, city government, or other local governmental entity that employs officers who deprive persons of rights protected by that section, jointly liable with the officers to victims of such officers' misconduct.

That Congress consider the advisability of empowering the Attorney General to bring civil actions to prevent the violation of persons from [illegible]

General Conclusion

The committee's studies indicate that civil rights problems occur in complex interacting forces which they cannot readily be isolated. Discrimination in one context is apt to be intertwined with discrimination in other contexts.

Inferior schooling, for example, makes it difficult for Negroes in some areas to achieve the vote—and combined with restriction to menial jobs, makes it difficult for them to assert other rights. . . .

It is also clear that racial restrictions in the housing market help to produce segregation in the schools, and that this in turn generally means inferior schools for minority group children. . . .

Finally residential segregation tends to produce and perpetuate slums, a breeding-ground for juvenile delinquency and crime, which in turn invite police misconduct.

These relationships suggest that no single, limited approach will bring an end to discrimination. While attention to one civil rights program at a time may achieve substantial progress, simultaneous action on many fronts is far more promising.

3 Types of Action Asked

The commission has made recommendations for three kinds of [Federal] action.

It has recommended invoking the power of the law to enforce the requirements of the Constitution: by new statutory requirements, and by measures to facilitate enforcement of existing law. . . .

A number of recommendations have also been made requiring the use of public funds in the fight against discrimination. It has recently stressed by President Kennedy that "Federal money should not be spent in any way which encourages discrimination, but rather [to encourage] the national goal of equal opportunity." . . .

Finally, the commission has made several recommendations calling for the exercise of leadership by the President and others in the Federal Government.

"These recommendations are based on the belief that the Presidency, and indeed the whole Federal establishment, is pre-eminently a place for moral leadership. The commission has been impressed with the influence which those in responsible positions can exert on the civil rights climate of the nation. . . ."

Hesburgh Excerpts

. . . The pursuit of happiness means many good things in America; equal opportunity to better one's self by a good education; equal opportunity to exercise political freedom and responsibility through the vote; equal opportunity to work and progress economically as all other Americans do; and equal opportunity to live in decent housing in a decent neighborhood as befits one's means and quality as a person.

Last I seem to be unduly harsh on the South, let me underline another story often repeated in these pages, which is a specialty of the North and East and West.

There is the [illegible] segment of the financial community which, even its owners in financing housing is purely economic as though this might somehow cancel out the moral dimension of what the [illegible] of moral concern [illegible] to happen to human beings, fathers, mothers and children, not Northern but American, that are a neighbor neighboring with no hope of the most elemental physical well-being, without which health, family and decent lives become impossible.

There are the [illegible] but very effective [illegible] of builders, real estate brokers and good neighbors who are downright [illegible] in preserving the [illegible] of democracy—for their own white selves alone. . . .

We spend billions of dollars trying to survive the [illegible] nations of the world (about 50 per cent, parenthetically that only 40 per cent is better than communism, not then wipe out all the good effects by not even practicing "our way" on our own homeland.

We are all excited about Communist supervision of home-study we perpetuate a much worse and without redemption of our own Constitution that survives the nation it will [illegible] natural [illegible] Order of rights [illegible] [illegible].

Personally, I don't care if the United States [illegible] to the first rank on the 10 mile, if while this is happening on a crash basis, we [illegible] here on our border of the earth, nursing our [illegible], flouting our magnificent Constitution, ignoring the central and appearing hypocrites to moral problems of our times, all the world. . . .

DEFENDANT'S EXHIBIT I.

NEW YORK POST, MONDAY, FEBRUARY 27, 1961

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THE SUIT AGAINST THE CHICAGO COPS

A Father Recalls His Night of Terror

By FLETCHER MARTIN
Special Post Correspondent

Chicago, Feb. 27 — The U. S. Supreme Court ruled a week ago today that James Monroe, a Negro carpenter, can sue 13 white policemen for abusing him and his family during an investigation of the murder of a white tavern owner here.

It was a crime for which the wife of the murder victim and her white lover were eventually convicted, but Monroe and his family disappeared from their old apartment after he filed a $203,000 damage suit against Police Capt. Frank Pape and the 12 other policemen who invaded his home on Oct. 29, 1958.

The Post finally located Monroe yesterday in the third home he has established in his flight from possible police reprisals. And here, in his own words, is his recollection of what happened that horror-cracked night in October, 1958:

* * *

Have you ever been in bed sleeping hard with nothing on but a flimsy T-shirt and have white policemen wake you up by sticking guns in your chin? Then have them parade you in front of your family and you as naked as a jaybird?

Well, that's what happened that night when Capt. Frank Pape and his troops invaded my house. He treated us, my wife and my kids as if we were dogs. Can you imagine how it is to stand there and take it? Nobody knows until it happens to them. That's why I hate him, and I will hate him on into the next world.

I had been in a tavern where I was doing some carpenter work for the owner. Some more fellows and I were sitting at the bar drinking beer and talking about hunting dogs. After a while I went on home, washed up, and went to bed.

Guns Drawn

The next thing I knew after I went to bed was about 6 o'clock the next morning. I heard my son, Robert, calling me and saying somebody had broken into the house. Then it was hard for me to wake up. I was lying on my stomach. We were sleeping under two blankets, my wife and I.

All I had on was a white T-shirt. My wife didn't have a stitch on. I saw three men at the foot of the bed with those flashlights with the big head. There were no other lights on. They had their guns drawn.

"Get up, you black son of a bitch," one of the men said. "I tried to pull the blanket up because I had nothing on under the T-shirt. They said: 'Drop the blanket or die.' Pape moved around and stuck me under the chin with his gun. He told me to get into the front room or get shot in the head. The other two policemen stayed in the bedroom with my wife.

Police Waiting

In the front room six or eight policemen were waiting for us. It looked like an army of cops to me because I was half asleep. One of them was a little fellow. He walked over to me and told me not to open my mouth. He stuck his gun under my right jaw and held it there. He said: "Nigger, you supposed to be bad. You ain't bad."

(Monroe had been arrested three times as a juvenile for passing a stolen check, for car theft and for robbery. At 36, he had not been in trouble again for 12 years.)

Pape went back into the bedroom, and he started hollering at my wife. Then I started cursing the policemen. The little cop told me to shut up. I said I would if he got that freak out of the room where my wife was.

Cop Kicks the Baby

Then my baby came running into the room, screaming and hollering. He's James Jr., and only 7 now. One of the men in the room stuck his foot out and tried to trip the baby. When my son jumped over his foot he kicked the baby.

I begged the policemen to let

Continued on Page 14

COPY POST EDITOR'S FREE

A Father, Suing Chicago Cops, Recalls Night of Terror

Continued from Page 1

me hold the baby, that if I held him he would surely stop crying. I told the cop who kicked him that he was a real bad man. That the kid was only 4 years old and he was trying to hurt him.

Then one of the cops put his gun behind his head. I was so ashamed. He let me hold the baby. Then they took my baby out of my arms and put him on the floor. He started crying again. I told them to let me put their guns down. I would whip them all. By this time I heard them beating my other kids. They even hit my daughter.

Children Screaming

I heard all the noise of the kids screaming. One of the men got my wife out of bed. Then Pape came into the front room and started jamming his flash light in my stomach. He said, "You ain't so bad, nigger."

He didn't act like a human being the way he was treating us. I begged him to quit. Then I called him every word I know, directly to his face. I thought I could direct his attention to me. In this way he would leave my family alone. But it didn't stop nothing.

He brought Houston and Robert, my sons, into the front room. All the time he hadn't brought me anything to put on. When my children were in the front room I asked him for something to put around me. He ignored me and told the kids to get up against the wall.

No Warrant Shown

All this time he didn't say what they wanted with us.

I had no idea what they were doing in my house. He didn't show me a warrant and he didn't even show his badge.

All the children saw me with my clothes off. My wife finally got me a pair of pants. Then I told me I could put them on after they searched them. In the back I heard my other kids hollering. I called them (cops) the lowest things that could come to a man's mouth. Pape made the two boys leave the front room. He said:

"Let's get this over with."

The little cop who kept his gun under my right jaw said: "This is it." My wife cried: "You're going to kill my husband," and Pape said: "Get that bitch out of here."

Daughter Slapped

My daughter, Jacqueline, said she was going outside and call the police. One of the men slapped her and said she wasn't going anywhere. We didn't know they were policemen. When they knocked on the door, my son Robert said, when he opened the door, they pushed him out of the way. He said one of the men kicked him. That's when he called me.

They tore up our furniture, saying they were hunting for something. I never learned what they were hunting for. Finally they said they were going to lock me up. They let me get a few more clothes, then took me downstairs and shoved me in a police car.

In the car, Pape kept telling me about how bad my children were to curse him like that. He said while children, his children, wouldn't have done that. He said his children would have been too intelligent to do that.

Put Into Another Car

When Pape got through talking, I told him his children would be cowards if they didn't speak up for their parents. Before we got where we were going, I was transferred to another car.

Pape told me, though, that I shouldn't feel badly about what the policemen had done at my house. He said:

"I'm only doing a job the best I know how. If I have been wrong, sue me."

Locked Up for 10 Hours

At Police Headquarters, down at 11th and State, they handcuffed me and put me in a cell. Later they had me in a lineup. They told me to say in front of some people there:

"Go on upstairs. I don't want to hurt him."

They kept me locked up for about 10 hours. Then they came to me and said if I would inform on anybody doing anything wrong in my neighborhood, they would turn me loose. Anything I had to report, they said, I could get in touch with them through a certain police informer. Then, in about 10 minutes, they drove me home.

When the policemen took me from home, one of my children took the license plate numbers on their cars. Frank Pape said loud enough for me to hear him:

"If it's the last thing I do, I'm going to kill them two black niggers."

You see I can never forgive a man like that. If he had let me and my children and my wife alone, this wouldn't have been in the Supreme Court, or any other court. But he hurt my children. And what they did any children would do.

I was born in Clarksdale, Miss. My wife was born in Birmingham, Ala. But all this happened to us in Chicago—Illinois.

NEW YORK POST
FEB 17 1961
EDITORIAL

DEFENDANT'S EXHIBIT J.

(Filed Mar 6 - 1969)

NA (Requested)
Ched/17/NYK Feb 22, 1961

To: Jones, NYK
Fm: Doust, Chi Edit (MJG)
ck X-NA-1-3-4-7

A Kicked-in Door (Take One)

It was 5:45 on the gray morning of October 29, 1958 and dawn dissolved over South Trumbull Avenue in a slummy, muddy neighborhood on Chicago's west side. In his neat, five-and-one-half room, ninety-dollar-a-month basement apartment at number 1424, a lanky 30-year-old Negro plasterer and carpenter named James Ezekiel Monroe, a proud man who had gone straight since his delinquent childhood, lay asleep with his wife in their bedroom. Their young son and five other children by their first marriage slept in two other bedrooms.

Robert, sixteen at the time, was the first to come awake. A light sleeper, partly because he shared an iron bed with his seventeen-year-old brother Houston, rolled over, gummy with slumber, to see men moving in trench coats outside his window. Then, abruptly, there was thunder at the kitchen door. It shuddered under the rain of a fist that rattled its window. Robert got up, thinking vaguely it was the janitor, who frequently came to the back door to get the key for the boiler room. He went to the kitchen, pulled on the light, saw nothing but his reflection in the kitchen door window. "Open the door!" was the hard demand he recalls hearing. "Open up!"

Robert turned the key in the door and several men tumbled in, he doesn't remember the number, for just then, down the hall, the front door exploded its square bolt lock and crashed open. For his troubles, Robert caught the butt of a .38 on his right temple and was knocked to the floor. A man stood over him. "I looked up and I was facing a .38," he remembers.

For himself, James Monroe was struggling from his sleep. He lay on his stomach, under a red blanket, the feet of his six foot six inch frame poking from the end of their Hollywoodstyle bed. "Get up you black (obscenity)! You dead?" A voice commanded him. He rolled over, snatching the blankets to his privates and looked into the blinding lances of three flashlight beams. "Get up!" Naked except for a t-shirt, Monroe got up, holding the red blanket around him.

He saw the men, in trench coats. Then he saw their .32 snub-nosed revolvers. "I seen the flashlights. But when I seen the guns I got scared," he says. One of the men commanded: "Drop that blanket, or you're dead." He dropped the blanket. Monroe, stunned an unaware these night riders were Chicago policemen, was steared into the front room, a pistol thrust up under his chin. He stood there in the cold, naked, goose-pimpled from fear and the chill, with this pistol shoved into his throat and two others —held by yet two more of Chicago's finest—pressed up above his mastoids. Two other guns were trained on him from across the room.

Back in the master bedroom, a cop directed 33-year-old Flossie Monroe to "Get her black ass out of bed!" She refused and lay there, under a green blanket, as the cop and another ransacked her closet and five dresser drawers. They produced no search warrant, didn't even announce that they were police. Out came the clothes onto the linoleum floor, out came the shoes and shirts and purses. Looking for Marshall Field labels on the shirts, the police took more

time there. Then Flossie was snatched out of her bed, naked except for the blanket she drew around her, and the mattress was torn open. Mattresses were torn open in the bedroom of Jacqueline, fourteen and four-year-old Jimmy (who slept together) and in the boys' back room, where Robert and Houston doubled-up as well as their brothers, twelve-year-old Ralph and ten-year-old Lawrence.

In the front room, James Monroe was cursing the police —although he still didn't know they were police—and demanding that they "get that freak out of my wife's bedroom." The freak and his friend came out of the room, along with Mrs. Monroe. Jacqueline, told by her mother, to leave the house and call the police to see who these men were, was knocked down by one of the cops as she entered the kitchen. Robert and Houston were both knocked down in their bedroom as well. One Robert was told to: "Get his black ass back in the bedroom!" Once he was told "to shut your goddam mouth or I'll blow your brains out." He shut his mouth, kept his brains.

The little boy, Jimmy, once was tripped when he ran into the front room, kicked. Once, when the family seemed clustered in the front room, James was directed to "get those black bastards out of here."

The children harassed the police and at the end, when James Monroe was being led from the house out the back door, the two oldest ran out to look at the cars and notice the license numbers. As the chief of the group of policemen, Frank Pape, then Deputy Chief of Detectives, a stocky cop known for his roughness with prisoners and his short-temper, turned to the children. He spoke to James Monroe and said of his step-sons: "If it's the last thing in my life, I'll kill those (obscenities)."

Monroe was taken to the corner of Roosevelt Road and Homan Avenue where he was put into another car. Frank Pape left him at this point, at this point Monroe knowing they were police but not knowing why he was being picked

up. As Pape left the car, he said: "If you think I did wrong, sue me."

Monroe was taken to the Central Police Headquarters at Eleventh and State and put in a cell. He was denied a phone call and was held for ten hours without charge. There were four magistrates on duty in the building at that time, sixteen on duty at various branches of the Municipal Court around the city. Monroe was not brought before a judge, never charged with a crime, not allowed to post a bond or make bail because no bail was set, not permitted to contact an attorney, family or friends, not informed of any formal charges, not informed of his privileges against self incrimination, not informed of his right for legal advice.

Monroe was a part of a roundup for the murder of Peter Saisi, who two days before was shot to death in the basement of his northside home. Saisi's wife, Mary, who had put the police on Monroe's trail by identifying him from a police picture, yet never fingered him after viewing him at a police lineup the day he was taken in, later confessed her part in the killing. Her lover, Richard Lansing, confessed. Both are serving prison terms.

Here is why Monroe is suing: "I wouldn't have gone down and seen about suing if that man hadn't promised to kill my sons." Monroe had his view of the ways of police —especially Chicago police—and in his craw he remembers seeing a drunk Negro die in the hands of cops. They dragged him down a flight of stairs, broke his neck. This happened during Monroe's childhood. He adds: "This'll make the fight easier in the South. They won't have to fight it quite as long now."

All of the material in Tuesday's New York Times is accurate. Some of this file—especially the crispness of the language—was told us today and is not included in the original complaint.

Regards.

MAO 635PMC.
MAO 649PMC.

DEFENDANT'S EXHIBIT K.

(Filed Mar 6 - 1969)

Wash—13/NYK—Feb. 22, 1961 (Requested)
kb X-NA-1-3-4-7-Roy Larsen

To: Jones

From: Meyers (Washington) (RP)

SUPREME COURT (NA)

The Supreme Court ruling in the case of Chicago Negro James Monroe is not one that leaves precedent shattered in august corridors. The majority looks at past rulings on similar questions, finds them good and lets them prevail. Justice Frankfurter, the lone dissenter, moved by concern over judicial restraint and Federal State relationship, says the earlier rulings—and this one—are wrong. He says it persuasively and at length, but without convincing his eight fellows on the Court.

Justice Douglas writes in support of the majority ruling that a private citizen may sue public officials for damages in Federal Courts under the 1871 "Ku Klux" Act even when the actions complained of are in violation of State law and when State Courts provide an unused remedy for the injured party. He argues that James Monroe, set upon illegally and brutally by Chicago cops (the decisions are replete with detail), should have the right to sue the cops, but not the city, in Federal Courts as well as in State Courts. He interprets the words "under color of" law in the Ku Klux Act (A Civil Rights law passed to deal with the KKK in reconstruction days) to include even the acts of policemen or others which are not sanctioned by State Law. He finds support for these views

in three earlier Supreme Court decisions and says the fact that Monroe could just as well sue under state law does not bar him from the federal courts.

Frankfurter dissents on the grounds that the Ku Klux Act provided recourse to the federal courts only when state laws or state-sanctioned actions interfere with a citizen's rights. The federal system requires leaving to state courts the cases in which they are able and—so far as has been determined in this case—willing to act in protection of the rights of citizens. Frankfurter dismisses the earlier Supreme Court decisions on the grounds that they mistakenly—even innocently—upset long-settled law. In other words, he believes the cases which now are precedent were improperly decided and the Court should go back to earlier interpretations of the meaning of the words "under color of" law as it is used in the 1871 Act. He himself agreed with the majority in one of the earlier cases, but now grandly confesses error.

That, in essence, is the argument of the two sides. Herewith some fleshing out of that skeleton:

"There can be no doubt . . . that Congress has the power to enforce provisions of the 14th Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it," Justice Douglas writes for the majority. The "question with which we now deal is the narrower one of whether Congress in enacting section 1979 (of the Ku Klux Act) meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position . . . we conclude that it did so intend."

This section of the law provides that "The District Courts shall have original jurisdiction of any civil action

authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States . . .'' The critical words here are ''under color of.''

Douglas says: ''It is argued that 'under color' of enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, state usage to do what he did. In this case it is said that these policemen, in breaking into petitioners' apartment, violated the Constitution and Laws of Illinois. It is pointed out that under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioner that full redress which the common law affords for violence done to a person; and it is earnestly argued that no 'statute, ordinance, regulation, custom or usage' of Illinois bars that redress.''

After considering the legislative history of the act (passed in reconstruction days to deal with the Ku Klux Klan and protect the rights of freed slaves), Douglas concludes: ''It is no answer that the State has a law which if enforced would give relief. The Federal remedy is supplementary to the State and the State remedy need not be first sought and refused before the Federal one is invoked. Hence the fact that Illinois by its Constitution and Laws outlaws searches and seizures is no barrier to the present suit in the Federal Court.''

Douglas also points out that previous Supreme Court decisions found that ''under color of'' State law extended to misuse of power under State law. The words also found their way into recent Civil Rights Laws, without opposition. ''We conclude that the meaning given 'under color of' law in the classic case and in the Screws and

Williams cases was the correct one; and we adhere to it." Douglas also found that the law limited the possible suit to the individuals, supported the lower courts in dismissing a companion suit against the City of Chicago. (The lower courts had dismissed Monroe's suit against the individual policemen also, and it was because of the apparent conflict of that action with the previous Supreme Court rulings—in Classics, Screws, etc.—that it came before the Supreme Court.) Douglas, therefore, sees no extension of the boundaries of precedent in this case.

In a concurring decision, Justice Harlan says he would find the "under color of" law issue "very close indeed" if this were the first time the Court had examined the meaning of the words. But because of the earlier interpretations by the Court, and lacking any clear showing of error in them," I agree that we should not now depart from the holdings of the Classic and Screws cases."

Justice Frankfurter, the dissenting member, agrees with the majority that the City of Chicago could not be sued under the Act. But he also believes that the individual policemen are exempted from suit under the Act and that James Monroe should file his suit in State courts: if his rights were not then protected by the State courts, he would have a valid cause for recourse to the Federal courts. His departure from the views of the majority comes on the interpretation of the phrase, "under color of." While deploring the action of the Chicago police, he argues that a suit under the statute could be maintained only if the action of the policemen were in accordance with State law. Since it was not and they exceeded their authority, they are in violation of State law, and the remedy for Monroe lies with the State courts.

Frankfurter speaks up for judicial restraint, as he often does, and shoves aside the earlier Supreme Court decisions as to the meaning of "under color of" by arguing

that they rested on insufficient inquiry into the legislative history and meaning of the words. He himself joined in one of the opinions cited to support the majority's decision to cling to the Court's earlier rulings, but Frankfurter explains: "I joined in this opinion without having made an independent examination of the legislative history of the relevant legislation or of the authorities drawn upon for the classic construction. Acquiescence so founded does not preclude the responsible recognition of error disclosed by subsequent study."

He also argues that the earlier Supreme Court rulings, now relied upon as being settled law, were actually instances when settled law was upset by inadvertence—and even without understanding. ". . . Although this Court has three times found that conduct of state officials which is forbidden by state law may be 'under color' of State law for purposes of the Civil Rights Acts, it is accurate to say that that question has never received here the consideration which its importance merits . . . particularly is this so (the need for fresh examination) when that interpretation, only recently made, was at its inception a silent reversal of the judicial history of the Civil Rights Acts for three quarters of a century."

Says Frankfurter after an exhaustive examination of legislative history: ". . . All the evidence converges to the conclusion that Congress by Section 1979 created a civil liability enforceable in the Federal courts only in instances of injury for which redress was barred in the State courts because some 'statute, ordinance, regulation, custom or usage' sanctioned the grievance complained of. This purpose, manifested even by the so-called 'radical' Reconstruction Congress of 1871, accords with the presuppositions of our Federal system. The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the State

courts, not the Federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism . . . it is not a work for courts to melt and recast this statute. 'Under color' of law meant by authority of law in the nineteenth century. No judicial sympathy, however strong, for needs now felt can give the phrase . . . any different meaning in the twentieth . . . Section 1979 was not designed to cure and level all the possible imperfections of local common-law doctrines, but to provide for the case of the defendant who can claim that some particular dispensation of State authority immunizes him from the ordinary processes of the law."

(Packeting the Supreme Court decisions in the Monroe and other cases. They are comprehensive and, with clips, should answer any other questions you may have. See also Tony Lewis's story in theNYTimes on the Monroe case—but ignore the ApPee story, which was screwed up in the version I saw.)

FPK—1.25

DEFENDANT'S EXHIBIT L.

(Filed Mar. 6-1969)

Rush Rush

NA (Suggested)
ek X-NA-S-1-3-4-7

Ched/2/NY Feb. 21, 1960

To: Gruin, NYK

From: Doust, Chi Edit

TERROR ON TRUMBULL STREET

Just the sort of cop that Chicago is trying to live down jumped back in the news yesterday from such an unlikely place as the Supreme Court chambers in Washington. The High Court ruled unanimously that tough Frank Pape, a classic roughneck cop in the old Chicago tradition, can be sued by a Chicago Negro who claims brutal abuse, ransacking, false arrest, death threats, and a handful of other astonishing bits of treatment in the hands of Pape and a dozen other policemen. But the case is vastly more important than the brutality of a single Chicago cop.

The case has been kicked around the courts and the Chicago press since it took place before dawn at Negro James Monroe's humble west-side home on Chicago's Trumbull Street. District and Circuit Courts ruled that Monroe could not bring suit under the Civil Rights Act of 1871. The Supreme Court dumped those rulings and Monroe is going whole hog on his suit, asking $570,000.

Suggest a look at this horror story, pointing to its clear and significant ramifications, namely that police brutality can be appealed not only to a usually un-sympathetic State court but to a Federal court. It is looked on here as an

enormously significant precedent for Southern Negroes—the Dawson, Georgia kind of victim—who got little sympathy in local courts on endless cases of police brutality. The lawyer for Monroe is a noted attorney for the underdog and the Civil Rights victim. Feeling of lawyers here is that the Negroes have "taken a pretty raw case to start with. Next would be the more tenuous cases. It follows a pattern of segregation suits." Regards. MES 1100A.

DEFENDANT'S EXHIBIT M.

(Filed Mar 6 - 1969.)

* * * * *

1) The Supreme Court

2) Another Monroe Doctrine

A Chicago Negro bearing the honored name of James Monroe was routed naked from his connubial bed by 13 police officers in the middle of the night, humiliated in front of his wife and children while his apartment was ransacked, and then hauled off to a police station for 10 hours of questioning about a two-day-old murder. He was released without being charged. He sued in Federal court under the Civil Rights ("Ku Klux") Act of 1871. Lower courts dismissed the suit on the grounds that Monroe's case should be brought in State courts, but this week the Supreme Court in an 8 to 1 decision (Justice Frankfurter dissenting for 58 pages) ruled that Federal courts have jurisdiction. We suggest a story on the Court's ruling in this case, parmarking other decisions in which 1) Mobster Frank Costello was stripped of his citizenship, 2) an indictment against Dave Beck and a group of trucking companies was upheld in a case involving a payment of $200,000 to Beck, and 3) an $852,075 award to truckers in an anti-trust case against 24 railroads was voided.

* * * * *

DEFENDANT'S EXHIBIT N.

(Filed Mar 6 - 1969.)

Ched 11/NY May 24, 1951

For NA (Suggested)

To Barron Beshoar, New York Rush Rush

From Heinke, Chicago

CHICAGO COP:

If you're in the market for a solid, lurid Chicago Crime story, we'd like to do a piece on the slaying last night of Chicago's toughest holdup artist, Red Kelly, the No. 1 guy of Chicago's No. 1 holdup gang, by the toughest cop in the Chicago Police force, Sgt. Frank Pape, of 51 the Robbery Detail. It was the sixth man Pape has shot to death in the line of duty and he's excelled in that department only by a south side cop, "Two Gun Pete" Washington, who has 11 notches on his gun. But all of Pape's victims have been cop killers or suspected cop killers in addition to being holdup men and he's champion in that department. It would have been Pape last night instead of Kelly if Pape hadn't drawn first, because Kelly had two loaded rods on the front seat of his car and was reaching for them when Pape fired. Pape is ungodly tough, ever since six years when cop killers killed his buddy. He had shot two or three before that time, but since the shooting of his pal he has vowed to get 'em before they got any other cops. In addition to the killing of Red Kelly, whom the Chicago cops have been searching for eight months, nine other holdup artists were captured in the coup engineered by Pape and his Robbery Squad pals. They included members of the gang who have used battering rams in recent

currency exchange holdups, in addition to other spectacular holdups. It was a good night's work and Pape went home well satisfied. His partner had been avenged once more. Will file late Friday for Saturday delivery if interested. Regards.

BWRE

HP 436P

11/29/56 Def. Ex. 7 for id

375

This Dead-Eye Dick Poison to Hoodlums

BY WILLIAM DOHERTY

You've probably heard more of Sherlock Holmes, Philo Vance and Charlie Chan than you have of Det. Sgt. Frank Pape. Yet none of the first three--about whom hundreds of books have been written --ever solved as much as a traffic jam.

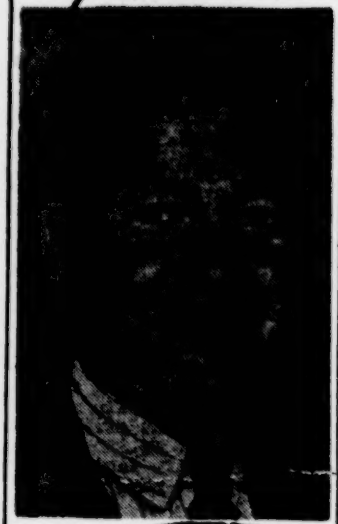
Pape, 39, has helped solve hundreds of crimes in 14 years on the Chicago police force. Some regard him as one of the best detectives in the country.

Radio gangbusters have nothing on him either. In the last six years, as a member of the robbery detail, he and his partners have been responsible for the roundup of the Three Hat gang, Friday Night gang, Riding Pants gang, Nine O'Clock gang, Vestibule gang, Time Table gang and Bookie Heist gang.

In all 109 men have been sent to the penitentiary through Pape's efforts.

On four occasions hoodlums chose to swap lead with him. Dead are Tom Daley, his most recent victim; Chris (The Greek) Perres, Victor Puzzo, Charles DeCola and Lyman T. Helman.

On Dec. 12 Pape walked into the flat where Daley had fled after strewing shot-up bodies -- some alive, some dead--around the county. When Daley lunged at Pape, the policeman's gun shot and killed him.



DET. SGT. FRANK PAPE

The handsome detective says he would rather take his captives alive.

"You can't get information on other hoods from a dead man," he explains.

But police life is not for him, HOODLUM DETECTIVE. He says: "He may not be as lucky as I've been and the job's tough."

JAN 3 1948

Pape has been commended 19 times by his superiors for exceptional bravery and achievement.

DEFENDANT'S EXHIBIT P.

COURT SANCTIONS SUING OF POLICE

Continued From Page 1, Col. 8

tice Felix Frankfurter. In a fifty-eight-page opinion he argued that the right to bring local officials into Federal Court should be strictly confined to preserve proper Federal-state relationships.

Returning from its mid-winter recess, the court also took these actions:

¶It stood by a 1947 decision that states might constitutionally supply buses for parochial school children

¶It upheld an order stripping Frank Costello, the racketeer, of his citizenship because he gave his occupation as "real estate" when he was naturalized in 1925 instead of answering truthfully "bootlegging."

¶It threw out an $852,074 judgment against Eastern Railroad and a lower court finding that they violated the Sherman Antitrust Act by conspiring to injure the reputation of trucks in Pennsylvania through deceptive public relations methods.

The Monroe case began at 5:45 A. M. Oct. 29, 1958. According to the complaint, this was what happened:

Frank Pape, Deputy Chief of Detectives, and twelve other men broke through two doors of the Monroe apartment. They woke Mr. and Mrs. Monroe and forced them at gun point to get out of bed naked and stand in the living room. The six Monroe children were also herded in there.

Chief Pape hit Mr. Monroe in the stomach with a flashlight and called him "nigger" and "black boy." Other policemen pushed Mrs. Monroe, kicked some of the children and pushed them to the floor.

The police, who had no arrest or search warrants, ransacked the apartment, dumping drawers and ripping open mattresses.

Mr. Monroe was taken to a police station, where he was questioned about a murder. For ten hours he was detained on open charges and shown in several line-ups. He was not brought before a magistrate or allowed to call a lawyer. He was finally released without charge.

The Monroe family sued the policemen and the City of Chicago for $200,000. The case never got to trial, because the Federal District Judge and the Seventh Circuit Court of Appeals dismissed the case.

The central issue before the Supreme Court today was the meaning of the Civil Rights Act of 1871, passed by Congress to deal with the Ku Klux Klan. It permits damage suits in Federal courts against anyone who, "under color of" state law, deprives someone of constitutional rights.

It was the phrase "under color of" law that divided the majority and Justice Frankfurter.

The court read the phrase simply to refer to any person acting under the guise of official authority. That would include any policeman or any local or state employe.

Justice Frankfurter said the phrase should be read to cover only officials whose actions were actually authorized by state and local law. Since what the policemen did was against Illinois law, Justice Frankfurter said they could not be said to have acted "under color of" law.

This disagreement is significant because most infringements on constitutional rights are also, at least theoretically, violations of local law.

Justice Frankfurter relied heavily on the legislative history of the 1871 act. But he also had a policy reason for construing the act narrowly—to keep the Federal courts out of what he considers state and local business.

He said the broader construction adopted by the court made the Federal Constitution "a law of the states," governing the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country."

In sum, Frankfurter view abused citizens would, in the main, have to sue in the state courts. He conceded that their chances of recovery might sometimes be poor, but he said that was the necessary price of the Federal-state system.

Justice Douglas, also reviewing the legislative history, said the very purpose of Congress had been to provide a Federal remedy even though there was a state remedy.

The case was argued by Donald Page Moore of Chicago for the Monroes and by Sydney R. Drebin, Assistant Corporation Counsel of Chicago, for the city and policemen.

HIGH COURT BACKS SUING OF POLICE

Federal Action Authorized in Civil Rights Cases

By ANTHONY LEWIS

Special to The New York Times.

WASHINGTON, Feb. 20—The Supreme Court held today that policemen and other local officials who violated a citizen's constitutional rights could be sued for damages in Federal courts.

A Chicago Negro handyman, James Monroe, brought the case after thirteen city policemen broke into his apartment early one morning. He said they had hit him, made him and his wife stand naked while they searched the apartment without a warrant, then held him illegally in jail before finally releasing him without charges.

Justice William O. Douglas wrote the principal opinion for an 8-to-1 majority. He said Mr. Monroe could sue the policemen as individuals but could not sue the City of Chicago.

The sole dissenter was Jus-

Continued on Page 39, Column 1

EDIT REF. FEB 21 1961 NYT

EDIT REF. FEB 21 1961 NYT

12/10/96 Def. Ex. P for id. (redacted) mw

DEFENDANT'S EXHIBIT Q.

CHICAGO'S AMERICAN
December 4, 1962

Deliberations Resumed in Cop Suit

AMERICAN DEC 4 1962

A federal jury resumed deliberations today in the hearing of a 1.4 million dollar damage suit charging five policemen with unlawful search and seizure.

The suit was filed in behalf of James Monroe, 39, of 1424 S. Trumbull av., his wife, Flossie, 35, and six children. Named in the suit are Capt. Frank Pape, Capt. Howard Pierson, Sgt. Edward Cagney, and Detectives John Bosquette, and Edward Bray. Pape, on leave from the police department, is chief security officer for a race track.

Monroe claims he was arrested on Oct. 29, 1958, without a warrant and was held for 10 hours without being permitted to post bond. He was questioned in the murder of Peter Saisi, an insurance agent whose wife and another man were later convicted of the crime.

The case is being heard in the federal District courtroom of Judge James B. Parsons.

CHICAGO'S AMERICAN
December 4, 1962

Bulletins

AMERICAN CASEY DIES 1962

Robert J. Casey, 72, Chicago newspaper man, author, and columnist, died today in St. Francis hospital, Evanston, where he had been confined for two weeks after suffering a stroke.

POLICE MU[illegible] PAY

Police captain, Frank [illegible] and four policemen must pay $13,000 damages to James Monroe, 39, of 1424 S. Trumbull av., for violating his civil rights, a federal jury decided today. Pape and the other defendants invaded Monroe's home in 1958 and mistreated him during their investigation of a murder, the jury found. Pape is liable for $8,000 of the total award.

DEFENDANT'S EXHIBIT R.

CHICAGO TRIBUNE
December 5, 1962

378

Order Pape, 4 Others to Pay $13,000

TRIBUNE DEC 5 1962

A federal District court jury yesterday awarded a total of $13,000 damages to a man and his wife who accused Capt. Frank Pape and four other policemen of brutality and violating their civil rights in an early morning raid on their home.

Pape

Capt. Howard Pierson, head of the police robbery detail and one of the defendants, termed the decision a "travesty on justice, a severe blow to law enforcement, and a step backward." He was ordered to pay $1,000 damages.

Pape Assessed $8,000

Capt. Pape, on leave from the police department as chief security officer of a race track, was not in court. He was ordered to pay $5,000 to James Monroe, 34, of 3338 Gladys av., who brought the suit, and $3,000 to Monroe's wife, Flossie, 35.

Sgt. Edward Cagney, supervising sergeant of the homicide division, was assessed $2,000 damages and two detectives now serving under Capt. Pierson, John Bosquette and Edward Bray, were ordered to pay $1,000 each.

The verdict came after the jury of three men and nine women had deliberated for 12 hours and 15 minutes in the courtroom of Judge James B. Parsons. The action originally was brought by Monroe, his wife, and their six children, all of whom charged brutality, and asked a total of $1,440,000 in damages.

12 Separate Findings

In its verdict containing 12 separate findings, all of the charges of the children, in which Pape alone was named, were dismissed.

Monroe charged that at 5:45 a. m. on Oct. 29, 1958, a squad of policemen under Capt. Pape invaded the apartment in which he was living at 1424 S. Trumbull av., dragged him out of bed, made him walk unclothed into another room, dragged his wife, also unclothed, out of bed, and wakened all the children, terrifying them.

Pape was charged with various acts of violence against the Monroes and their children. The suit filed March 2, 1959, brought charges against 13 policemen, but accusations against eight of them were dismissed during the trial which began before Judge Parsons Nov. 5.

Time Given for Appeal

Monroe charged he was arrested and taken to police headquarters, where he was held 10 hours without counsel or appearance before a magistrate in violation of his civil rights.

Monroe was seized as a suspect in the murder Oct. 27, 1958, of Peter Saisi, a north side store owner. Saisi's wife and her lover later were convicted of the murder.

Monroe is a Negro. Mrs. Saisi in her accounts to police said a Negro had entered the basement office at her home and killed her husband, but her story was disclosed to be a fabrication.

Benjamin Novoselsky, attorney for the five policemen, was given until Dec. 11 by Judge Parsons to make motions for a new trial or to appeal.

DEFENDANT'S EXHIBIT S.

CHICAGO'S AMERICAN

December 5, 1962

379

PAPE, 4 OTHERS GUILTY

City Studies Appeal in Cop-Rights Case

AMERICAN DEC 5. 1962

The city corporation counsel's office is trying to decide whether to appeal a federal court conviction of five policemen in a civil rights case.

A jury in federal District court found the five policemen, including Capt. Frank Pape, guilty and awarded a total of $13,000 damages to a man and his wife who had accused them of brutality and violating their civil rights.

John C. Melaniphy, the corporation counsel, said he will ask the appeals division in his office to determine whether further court action should be taken.

Race Track Job

The jury returned the verdict against Pape, now on leave and working as security director for two race tracks; Sgt. Edward Cagney; Capt. Howard Pierson, and Detectives John Bosquette and Edward Bray.

Pape was assessed $8,000, of which $5,000 is to go to James Monroe, 34, of 4338 Gladys av., who brought the suit, and $3,000 to Monroe's wife, Glossie, 35.

Cagney, supervising sergeant of the homicide division, was ordered to pay $2,000 damages, and the others to pay $1,000 each.

Monroe charged that at 5:45 a. m. Oct. 29, 1958, the policemen led by Pape forced their way into his apartment at 1424 S. Trumbull av., where he was then living.

He said they dragged him out of bed unclothed, dragged his wife out of bed, and awakened the children. Monroe said he was taken to police headquarters where he was held 10 hours without counsel or appearance before a judge in violation of his civil rights.

Police had been investigating the murder of Peter Saisi, slain 2 days earlier, at the time they invaded the Monroe apartment. Monroe later was cleared of the murder when Saisi's wife and her lover were convicted in a murder plot.

Gives Time for Appeal

Federal Judge B. Parsons gave the policemen's attorney until Tuesday to file motions for appeal or a new trial.

In similar cases, the city has followed the custom of paying damages in cases of policemen found guilty of violating the civil rights of prisoners.

In his suit, Monroe also had asked damages for each of his 6 children, but the jury of 9 women and 3 men dismissed these charges.

DEFENDANT'S EXHIBIT T.

CHICAGO DAILY NEWS
Dec. 12, 1962

380

Upholds Verdict on Five Cops

NEWS

DEC 12 1962

Judge Backs Fines In Rights Case

Federal Judge James B Parsons refused Wednesday to set aside a jury verdict and grant a new trial for five Chicago policemen found guilty of civil rights violations.

Parsons told Benjamin Novoselsky, assistant corporation counsel defending the men, that he would take under advisement another motion to reduce the amount of damages assessed.

• • •

JAMES MONROE, 34, of 4338 W. Gladys, and his wife, Flossie, 35, were awarded $13,000 damages in U.S. District Court Dec. 4. They said Capt. Frank Pape and four other policemen violated their civil rights in a 1958 arrest.

Of the damages, Pape was to pay $8,000, Sgt. Edward Cagney $2,000, and Capt. Howard Pierson, Det. John Bosquette and Det. Edward Bray $1,000 apiece.

In his argument, Novoselsky pointed out that the criminal fine for the same offense is a maximum of $1,000. He said the amount awarded by the jury was "grossly excessive" and indicated "ill will" toward the policemen.

PLAINTIFF'S EXHIBIT 2, 1D.

(Filed Mar 6 - 1969.)

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—No. 59 C 329) * *

AMENDED COMPLAINT.

JURISDICTIONAL ALLEGATION.

Jurisdiction is invoked under 28 U. S. C. A. §§ 1331 and 1343 and 42 U. S. C. A. § 1983, and Amendment XIV to the Constitution of the United States.

COUNT I.

James Monroe, plaintiff, by his attorneys, Donald Page Moore, Ernst Liebman, and Rogers, Rogers, Strayhorn & Harth, complaining of the defendants, Frank Pape, Anton J. Pruneckle, Frank A. McMahon, John Higgins, Howard Felker, Gerald Sullivan, Jerry Sullivan, Patrick Conway, James McMahon, Howard Pierson, James Hurley, John Bosquette, and Edward Bray says:

1. This action arises under the Constitution and laws of the United States and the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

2. During all times herein mentioned, plaintiffs, and each of them, were, and they still are citizens of the United States or other persons within the jurisdiction thereof, and they resided, and now reside, in Chicago, Illinois.

3. During all times mentioned herein, the defendants, and each of them, were duly appointed, qualified and acting police officers of the Police Department of the City of

Chicago, a municipal corporation of the State of Illinois, and were agents of the said City, acting in the course of their employment and engaged in the performance of their duties as police officers of the said City.

4. During all times mentioned herein, the defendants and each of them were assigned to, and acting under the orders of, that subdivision of the said Police Department which is commonly known as the "Detective Bureau."

5. During all times herein mentioned, the defendant Frank Pape was the Deputy Chief of Detectives of the Chicago Police Department and was the second ranking officer in the aforesaid "Detective Bureau" of the Chicago Police Department.

6. During all times herein mentioned the defendants and each of them were acting under color of the statutes, ordinances, regulations, customs and usages of the State of Illinois, of the County of Cook and of the City of Chicago.

7. The City of Chicago at all times herein mentioned was the employer of the defendants, and each of them. Said City at all times herein mentioned provided the individual defendants, and each of them, with an official badge and identification card, which designated and described its bearer as an officer of the said City's Department of Police. Said City is the municipal corporation in the name of which the individual defendants, and each of them performed all acts and omissions alleged herein.

8. During all times herein mentioned, the plaintiff James Monroe was:

(a) The lawful husband of the plaintiff Flossie Monroe;

(b) The father of the plaintiff James Monroe, Jr., a minor;

(c) The step-father of the plaintiffs Lawrence Stevens, Ralph Stevens, Robert Stevens, Houston Stevens, and Jacqueline Stevens, all of whom are minors.

9. During all times herein mentioned, the plaintiff Flossie Monroe was:

(a) The lawful wife of the plaintiff James Monroe;

(b) The mother of the plaintiffs James Monroe, Jr., Lawrence Stevens, Ralph Stevens, Robert Stevens, Jacqueline Stevens, and Houston Stevens.

10. On or about October 29, 1958, at about 5:45 A.M., the plaintiffs, and each of them, were asleep in their beds in the apartment where they reside as a family, located at 1424 South Trumbull Avenue, Chicago, Illinois. Then and there, the defendants, Pape, Pruneckle, Higgins, Felker, Conway, Frank McMahon, Gerald Sullivan and Jerry Sullivan, and each of them, broke and entered into the apartment of the plaintiffs through the front and rear doors thereof, and did the following acts, among others:

(a) They caused all of the plaintiffs to arise from their beds.

(b) They searched all of the rooms, drawers and closets of the said apartment.

(c) They assaulted and battered plaintiffs James Monroe, Flossie Monroe, James Monroe, Jr., Robert Stevens, Houston Stevens, and Jacqueline Stevens.

(d) They placed plaintiff James Monroe under arrest, and caused him to be removed from the said apartment.

11. None of the defendants, at any of the times mentioned herein, and, more particularly, at the time and place of the events alleged in Paragraph 10 above, had in his possession any warrant issued by any judge, court, or magistrate authorizing:

(a) A search of the aforesaid apartment; or

(b) The arrest of the plaintiff James Monroe; nor had any warrants in fact been issued by any judge, court or magistrate for the said arrest or search.

12. At the conclusion of the events described in Paragraph 10, the defendants named in Paragraph 10 caused

the plaintiff James Monroe to be carried in the aforesaid automobile to the Central Police Headquarters of the Chicago Police Department located at 1121 South State Street, Chicago, Illinois, and caused him to be there imprisoned.

13. Upon his arrival at the aforesaid Central Police Headquarters at or about 6:00 o'clock A.M., the plaintiff James Monroe was placed in a locked and barred jail cell therein and was there imprisoned for approximately ten hours. During the course of this ten-hour period, the plaintiff was from time to time removed from the aforesaid jail cell and placed upon exhibition in a line of other individuals so that various persons could observe him and them. Also, during the aforesaid ten-hour period the plaintiff James Monroe was subjected to intermittent interrogation concerning various crimes and other police business.

14. (a) Throughout the aforesaid ten-hour imprisonment, the plaintiff James Monroe:

(1) Was never brought before a judge, court or magistrate;

(2) Was never charged with a crime;

(3) Was never able to make bail or post a bond for his release because no bail had been set in his "case";

(4) Was not permitted to contact his attorney, his family, or his friends, and thereby inform them of his whereabouts, the circumstances of his imprisonment, and thereby also to obtain counsel and advice;

(5) Was not informed of any formal charges which were to be placed against him by the police or by any other person or persons;

(6) Was not informed of his privilege against self-incrimination;

(7) Was not informed of his right to the advice of an attorney.

Instead, the plaintiff James Monroe was detained and imprisoned by the defendants and all of them upon the purported justification that he had been arrested and was held for "investigation", on "open" charges, by which terminology the defendants meant that he was not being held to answer to a charge of a violation of a statute or ordinance, but instead was being held without legal charge for the purpose of being investigated and interrogated and placed upon exhibition for viewing by the various victims of various alleged crimes and by various police officers. This aforesaid imprisonment of the plaintiff James Monroe was caused to be committed by the defendants, and all of them, including (but not limited to) the defendants Pierson, Hurley, Bosquette, Bray, and James McMahon.

(b) At the conclusion of the aforesaid ten-hour imprisonment, the plaintiff James Monroe was released from custody by the defendants. He was not then charged with a crime or violation of ordinance, nor has he ever subsequently so charged.

15. Throughout some or all of the period of plaintiff James Monroe's aforesaid imprisonment, the following branches among others of the Municipal Court of the City of Chicago were in session in the Central Police Headquarters at 1121 South State Street, Chicago, Illinois:

Branch 27
Branch 40
Branch 41
Branch 42

Throughout some or all of the period of plaintiff's imprisonment by the police, the following additional branches (among others) of the Municipal Court of Chicago were in session in the City of Chicago:

Branch 25

Branch 28
Branch 30
Branch 32
Branch 34
Branch 35
Branch 36
Branch 38
Branch 39
Branch 43
Branch 44
Branch 46
Branch 47
Branch 52
Branch 54
Branch 57

All of the aforesaid branches have jurisdiction to grant police officers leave to file criminal and quasi-criminal complaints against arrested persons and have jurisdiction to admit arrested persons to bail.

16. The aforesaid acts of the defendants constituted a violation of the Constitution and laws of the United States of America, in that the plaintiffs, and each of them, were deprived by the defendants, and each of them, of their right to be secure in their home against arbitrary and unreasonable searches and seizures and of their right not to be deprived of their lives, liberties and property, without due process of law, all in violation of Amendment XIV of the United States Constitution and 28 U. S. C. A. § 1343 (3) and 42 U. S. C. A. § 1983.

17. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiff James Monroe suffered great bodily pain and injury and mental anguish, from then until now and he will continue so to suffer in the future; and he has lost and will in the

future lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore plaintiff James Monroe demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action and he further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and he further demands such other relief as to this Court seems just, proper and equitable.

Count II.

1-16. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 1 to and including Paragraph 16 of Count I of this complaint.

7. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiff Flossie Monroe suffered great bodily pain and injury and mental anguish, from then until now and she will continue so to suffer in the future; and she has lost and will in the future lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Flossie Monroe demands judgment against the defendants, and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action, and she further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and she further demands such other relief as to this Court seems just, proper and equitable.

COUNT III.

1-16. Plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr. (all of whom are minors and appear here by Flossie Monroe, their mother and next best friend) incorporate and reallege herein Paragraphs 1 through and including Paragraph 16 of Count I of this complaint.

17. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr., and each of them, suffered great bodily pain and injury and mental anguish, from then until now and will continue so to suffer in the future; and each of them has been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Houston Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff Robert Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff Lawrence Stevens, demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff Ralph Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff Jacqueline Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00), and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff James Monroe, Jr. demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each

of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) and further demands such other relief as to this Court seems just, proper and equitable.

JAMES MONROE, FLOSSIE MONROE, AND HOUSTON STEVENS (a minor), ROBERT STEVENS (a minor), LAWRENCE STEVENS (a minor), RALPH STEVENS (a minor), JACQUELINE STEVENS (a minor), and JAMES MONROE, JR. (a minor), by FLOSSIE MONROE, their mother and next best friend, Plaintiffs

By: .....

DONALD PAGE MOORE, ERNST LIEBMAN, and ROGERS, ROGERS, STRAYHORN & HARTH, Their Attorneys,
105 W. Adams Street,
Chicago 3, Illinois

PLAINTIFF'S EXHIBIT 3, ID.

(Filed Mar. 6 - 1969)

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—No. 59 C 329) * *

SECOND AMENDED COMPLAINT.

JURISDICTION ALLEGATION.

Jurisdiction is invoked under 28 U. S. C. A. §§ 1331 and 1343 and 42 U. S. C. A. § 1983, and Amendment XIV to the Constitution of the United States.

COUNT I.

James Monroe, plaintiff, by his attorneys, Donald Page Moore, Ernst Liebman, and Rogers, Rogers, Strayhorn & Harth, complaining of the defendants, Frank Pape, Anton J. Pruneckle, Frank A. McMahon, John Higgins, Howard Felker, Gerald Sullivan, Jerry Sullivan, Patrick Conway, James McMahon, Howard Pierson, Joseph P. Hurley, John Bosquette, Edward Bray, and Edward Cagney, says:

1. This action arises under the Constitution and laws of the United States and the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

2. During all times herein mentioned, plaintiffs, and each of them, were, and they still are citizens of the United States or other persons within the jurisdiction thereof, and they resided, and now reside, in Chicago, Illinois.

3. During all times mentioned herein, the defendants, and each of them, were duly appointed, qualified and acting police officers of the Police Department of the City of

Chicago, a municipal corporation of the State of Illinois, and were agents of the said City, acting in the course of their employment and engaged in the performance of their duties as police officers of the said City.

4. During all times mentioned herein, the defendants and each of them were assigned to, and acting under the orders of, that subdivision of the said Police Department which is commonly known as the "Detective Bureau."

5. During all times herein mentioned, the defendant Frank Pape was the Deputy Chief of Detectives of the Chicago Police Department and was the second ranking officer in the aforesaid "Detective Bureau" of the Chicago Police Department.

6. During all times herein mentioned the defendants and each of them were acting under color of the statutes, ordinances, regulations, customs and usages of the State of Illinois, of the County of Cook and of the City of Chicago.

7. The City of Chicago at all times herein mentioned was the employer of the defendants, and each of them. Said City at all times herein mentioned provided the individual defendants, and each of them, with an official badge and identification card, which designated and described its bearer as an officer of the said City's Department of Police. Said City is the municipal corporation in the name of which the individual defendants, and each of them performed all acts and omissions alleged herein.

8. During all times herein mentioned, the plaintiff James Monroe was:

(a) The lawful husband of the plaintiff Flossie Monroe;

(b) The father of the plaintiff James Monroe, Jr., a minor;

(c) The step-father of the plaintiffs Lawrence Stevens, Ralph Stevens, Robert Stevens, Houston Stevens, and Jacqueline Stevens, all of whom are minors.

9. During all times herein mentioned, the plaintiff Flossie Monroe was:

(a) The lawful wife of the plaintiff James Monroe;

(b) The mother of the plaintiffs James Monroe, Jr., Lawrence Stevens, Ralph Stevens, Robert Stevens, Jacqueline Stevens, and Houston Stevens.

10. On or about October 29, 1958, at about 5:45 A.M., the plaintiffs, and each of them, were asleep in their beds in the apartment where they reside as a family, located at 1424 ouht Trumbull Avenue, Chicago, Illinois. Then and there, the defendants, Pape, Pruneckle, Higgins, Felker, Conway, Frank McMahon, Gerald Sullivan and Jerry Sullivan, and each of them, broke and entered into the apartment of the plaintiffs through the front and rear doors thereof, and did the following acts, among others:

(a) They caused all of the plaintiffs to arise from their beds.

(b) They searched all of the rooms, drawers and closets of the said apartment.

(c) They assaulted and battered plaintiffs James Monroe, Flossie Monroe, James Monroe, Jr., Robert Stevens, Houston Stevens, and Jacqueline Stevens.

(d) They placed plaintiff James Monroe under arrest, and caused him to be removed from the said apartment.

10-1. The acts hereinbefore alleged in this Paragraph 10 were committed either upon the instructions of Cagney or upon information supplied by him to one or more of Defendants Pape, Pruneckle, Higgins, Felker, Conway, Frank McMahon, Gerald Sullivan and Jerry Sullivan, and the aforesaid acts were committed with Cagney's knowledge and consent.

11. None of the defendants, at any of the times mentioned herein, and, more particularly, at the time and place of the events alleged in Paragraph 10 above, had in his

possession any warrant issued by any judge, court, or magistrate authorizing:

(a) A search of the aforesaid apartment; or

(b) The arrest of the plaintiff James Monroe; nor had any warrants in fact been issued by any judge, court, or magistrate for the said arrest or search.

12. At the conclusion of the events described in Paragraph 10, the defendants named in Paragraph 10 caused the plaintiff James Monroe to be carried in the aforesaid automobile to the Central Police Headquarters of the Chicago Police Department located at 1121 South State Street, Chicago, Illinois, and caused him to be there imprisoned.

13. Upon his arrival at the aforesaid Central Police Headquarters at or about 6:00 o'clock A.M., the plaintiff James Monroe was placed in a locked and barred jail cell therein and was there imprisoned for approximately ten hours. During the course of this ten-hour period, the plaintiff was from time to time removed from the aforesaid jail cell and placed upon exhibition in a line of other individuals so that various persons could observe him and them. Also, during the aforesaid ten-hour period the plaintiff James Monroe was subjected to intermittent interrogation concerning various crimes and other police business.

14. (a) Throughout the aforesaid ten-hour imprisonment, the plaintiff James Monroe:

(1) Was never brought before a judge, court or magistrate;

(2) Was never charged with a crime;

(3) Was never able to make bail or post a bond for his release because no bail had been set in his "case";

(4) Was not permitted to contact his attorney, his family, or his friends, and thereby inform them of his whereabouts, the circumstances of his imprisonment, and thereby also to obtain counsel and advice;

(5) Was not informed of any formal charges which were to be placed against him by the police or by any other person or persons;

(6) Was not informed of his privileges against self-incrimination;

(7) Was not informed of his right to the advice of an attorney.

Instead, the plaintiff James Monroe was detained and imprisoned by the defendants and all of them upon the purported justification that he had been arrested and was held for "investigation," on "open" charges, by which terminology the defendants meant that he was not being held to answer to a charge of a violation of a statute or ordinance, but instead was being held without legal charge for the purpose of being investigated and interrogated and placed upon exhibition for viewing by the various victims of various alleged crimes and by various police officers. This aforesaid imprisonment of the plaintiff James Monroe was caused to be committed by the defendants, and all of them, including (but not limited to) the defendants Pierson, Hurley, Bosquette, Bray, and James McMahon.

(b) At the conclusion of the aforesaid ten-hour imprisonment, the plaintiff James Monroe was released from custody by the defendants. He was not then charged with a crime or violation of ordinance, nor has he ever subsequently been so charged.

15. Throughout some or all of the period of plaintiff James Monroe's aforesaid imprisonment, the following

branches among others of the Municipal Court of the City of Chicago were in session in the Central Police Headquarters at 1121 South State Street, Chicago, Illinois:

Branch 27
Branch 40
Branch 41
Branch 42

Throughout some or all of the period of plaintiff's imprisonment by the police, the following additional branches (among others) of the Municipal Court of Chicago were in session in the City of Chicago:

Branch 25
Branch 28
Branch 30
Branch 32
Branch 34
Branch 35
Branch 36
Branch 38
Branch 39
Branch 43
Branch 44
Branch 46
Branch 47
Branch 52
Branch 54
Branch 57

All of the aforesaid branches have jurisdiction to grant police officers leave to file criminal and quasi-criminal complaints against arrested persons and have jurisdiction to admit arrested persons to bail.

16. The aforesaid acts of the defendants constituted a violation of the Constitution and laws of the United

States of America, in that the plaintiffs, and each of them, were deprived by the defendants, and each of them, of their right to be secure in their home against arbitrary and unreasonable searches and seizures and of their right not to be deprived of their lives, liberties and property, without due process of law, all in violation of Amendment XIV of the United States Constitution and 28 U. S. C. A. § 1343 (3) and 42 U. S. C. A. § 1983.

17. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiff James Monroe suffered great bodily pain and injury and mental anguish, from then until now and he will continue so to suffer in the future; and he has lost and will in the future lose large sums of money by reason of having been greatly humiliated and help up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore plaintiff James Monroe demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action and he further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and he further demands such other relief as to this Court seems just, proper and equitable.

Count II.

1-16. Plaintiff Flossie Monroe incorporates and realleges herein Paragraphs 1 to and including Paragraph 16 of Count I of the complaint.

17. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiff Flossie Monroe suffered great bodily pain and injury and mental anguish, from then until now and she will continue so to suffer in the future; and she has lost and will in the

future lose large sums of money by reason of having been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Flossie Monroe defends judgment against the defendants and each of them, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00) plus the costs of this action and she further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00) plus the costs of this action; and she further demands such other relief as to this Court seems just, proper and equitable.

COUNT III.

1-16. Plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe, Jr. (all of whom are minors and appear here by Flossie Monroe, their mother and next best friend) incorporate and reallege herein Paragraphs 1 through and including Paragraph 16 of Count I of this complaint.

17. As a direct and proximate result of the aforesaid acts of the defendants, and each of them, the plaintiffs Houston Stevens, Robert Stevens, Lawrence Stevens, Ralph Stevens, Jacqueline Stevens, and James Monroe Jr., and each of them, suffered great bodily pain and injury and mental anguish, from then until now and will continue so to suffer in the future; and each of them has been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendants.

Wherefore, plaintiff Houston Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each

of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff Robert Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff Lawrence Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff Ralph Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00); and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff Jacqueline Stevens demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each

of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00), and further demands such other relief as to this Court seems just, proper and equitable.

Wherefore, plaintiff James Monroe, Jr. demands judgment against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) plus the costs of this action and further demands punitive damages against the defendants and each of them, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00) and further demands such other relief as to this Court seems just, proper and equitable.

JAMES MONROE, FLOSSIE MONROE, and HOUSTON STEVENS (a minor), ROBERT STEVENS (a minor), LAWRENCE STEVENS (a minor), RALPH STEVENS (a minor), JACQUELINE STEVENS (a minor), and JAMES MONROE, JR. (a minor), by FLOSSIE MONROE, their mother and next best friend,

Plaintiffs.

By: .....

DONALD PAGE MOORE, ERNST LIEBMAN, and ROGERS, ROGERS, STRAYHORN & HARTH,

Their Attorneys,

105 W. Adams Street
Chicago 3, Illinois

PLAINTIFF'S EXHIBIT 1.

(Filed Mar 6 - 1969)

(Chicago Police Department Letterhead)

1 September, 1960

N. B. B.

Record of James Monroe
F. B. I. #3974079

As James Monroe—Mar. 25, 1944 Natl. Tr. Sch. for boys, Washington, D. C. 1 yr. & 1 day. Mail theft. From Chicago, Illinois

—Mar. 2, 1945 St. Charles, Ill. Tr. Sch. until 21. C. C. W. Rel. Dec. 21, 1945 reg. placement.

D47258—Mar. 3, 1947 sent Joliet, Ill. Pen. #24978. Robb. 2-4 yrs. Fined Armed. Judge Ward. Offs. Maher & Selke, 22d Dist. Trans. May 16, 1947 to S. P.? Pontiac, Ill. #16413. Disch. May 20, 1950, exp. of sent.

—Apr. 20, 1951 inv. Off. Grace & co., 22d Dist.

E12687—Mar. 11, 1955 G. P. Off. Halley & Hanrahan, 25th Dist.

—Oct. 29, 1958, Inv. Off. Dep. Chief Pape, D. B.

/s/ JAMES E. DEVERY
Director of Identification

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—No. 61 C 2202) * *

(Filed Jan 14 1969)

Now comes the defendant by its attorneys at the close of the plaintiff's case in chief and hereby moves that the Court direct the jury to return a verdict for the defendant as a matter of law.

* * * * *

UNITED STATES DISTRICT COURT.

Name of Presiding Judge, Honorable Edwin A. Robson

Cause No. 61 C 2202 Date Jan 15 1969

Title of Cause—Frank Pape vs. Time, Incorporated

Brief Statement of Motion—On trial (mo. of pltff. for dir. verdict pdg.)

Order motion of deft, made at close of pltff's. case for directed verdict in its favor hereby denied. Evidence heard for deft. Deft. rests. Rebuttal evidence heard for pltff. Pltff. rests. Both sides rest. At close of all evidence deft. renews motion for directed verdict in its favor. Argmts heard and conc'l'd on said motion and order said motion entd. & contd. to Jan. 16, 1969 for ruling. Order jury to separate and cause adjourned until Jan. 16, 1969.

/s/ Robson, *J.*

Jan 17 1969

UNITED STATES DISTRICT COURT.

Name of Presiding Judge, Honorable Edwin A. Robson

Cause No. 61 C 2202 Date January 16, 1969

Title of Cause—Frank Pape vs. Time, Incorporated

Brief Statement of Motion—On trial (def. mo. for directed verdict made at close of all evidence pdg.)

Pursuant to memorandum filed herewith orders deft's motion for a directed verdict at the close of all evidence hereby granted with judgment hereby rendered for the defendant on the issue of liability, and cause hereby dismissed without costs. (Draft)

/s/ Robson, *J.*

Jan 21 1969

UNITED STATES DISTRICT COURT.

* * (Caption—No. 61 C 2202) * *

MEMORANDUM AND ORDER ON MOTION FOR DIRECTED VERDICT.

The defendant has moved for a directed verdict at the close of all the evidence. For the reasons set forth below, this court is of the opinion that the motion should be granted.

The plaintiff, Frank Pape, is suing Time, Incorporated for libel allegedly arising out of an article published November 24, 1961, which described the search of James Monroe's apartment on the west side of Chicago and Monroe's subsequent arrest by the plaintiff and seven fellow police officers. The plaintiff is a "public official," Pape

v. Time, Incorporated, 354 F. 2d 558, 560 (7th Cir. 1965), and in order for such a public official to recover a libel judgment against the present defendant, he must prove "with convincing clarity" that the article was false and was published with actual malice. New York Times Co. v. Sullivan, 376 U. S. 254, 285-286 (1964); Garrison v. Louisiana, 379 U. S. 64 (1964); St. Amant v. Thompson, 390 U. S. 727 (1968). "Actual malice" has been defined as false statements published with knowledge that they are false, or with reckless disregard as to their truth or falsity. New York Times v. Sullivan, supra. "Reckless disregard" may be shown to exist where there exists "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant, supra, at 731. In addition, "recklessness may be found where there are obvious reasons to doubt the accuracy of [an] informant or the accuracy of his reports." Id., at 732. In order to preserve First Amendment rights, it is clear that "some erroneous publications [must be protected] as well as true ones." In determining whether actual malice exists, the writer's personal belief that his story is true is important, but is only one factor to consider. Id., at 732.

In the article complained of in this case, the defendant's writer, Edward F. Magnuson, a veteran reporter, purported to quote part of the publication, Justice, which was compiled by the members and staff of the United States Civil Right Commission. The portion of the article complained of is as follows:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says Justice, 'broke through two doors, woke the Monroe couple

with flashlights, and forced them to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and black boy." Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment." Time magazine, November 24, 1961, at 16.

This quote omits the words which immediately preceded it. The Justice report states that these were allegations contained in a complaint. This omission, which has been ruled to be at least "negligent," is not enough to sustain the plaintiff's burden of proof (as outlined above), since the standard for actual malice is far stricter than the standard for negligence. Pape v. Time, Incorporated, 354 F. 2d 558, 560 (7th Cir. 1965). This court, therefore, must look further into the background of this article.

Mr. Magnuson testified that he read the omitted words, but decided not to include them in the article as it appeared in Time magazine. He explained the omission by pointing out that the Civil Rights Commission, appointed by the President, was set up by Congress to report on the problems of minorities, and its members were highly respected individuals. This meant to him, he testified, that if an example was used in the text of the report, it was considered by the Commission to be "substantially" true, no matter how the example was worded. In some of the examples, the words "alleged" or "allegation" were not used; in others, such as the

one before this court, those words were used. Although the Justice report did warn that they had made no conclusive determination of the correctness of the statements of the complainants or officers, the report also said that "the allegations appeared substantial enough to justify discussion in this study." Justice, at 5. This statement modifies the whole report, and thereby makes almost all the examples contained in the report "allegations" of one sort or another, except where (in two cases) convictions had been obtained. Therefore, the appearance of the word "alleges" at the beginning of the section in Justice describing the plaintiff's activities is not of controlling significance. It was undisputed in the record that Mr. Magnuson in personal good faith interpreted the word "alleges" in the light suggested above. Professions of good faith, however, may not be sufficient in certain cases. St. Amant, supra. It is vital to describe the research that went into this article.

It has been stipulated between the parties that Mr. Magnuson consulted three sources before he wrote the article: the Justice report itself, a press release issued by the Civil Rights Commission concerning its Justice volume (Defendant's Exhibit [DX] G), and a news article in the New York Times of November 17, 1961 (DX H). All of these, if they mention the Pape incident at all, refer to the fact that the statements were contained in a complaint. After the article was drafted, it was sent to Champ Clark, then editor of the National Affairs Section, who in turn, according to an established procedure, sent it to the defendant's Research Department. The article was checked for factual accuracy by Miss Karen Burger (now Mrs. Karen Booth), whose deposition was read in open court. Her job was to make corrections in consultation with the senior editor and the writer. She testified that she did not call the omission to their attention, since

she had determined that the writer had good reasons for the omission and that the quote was factually accurate. In order to make this determination, she rechecked the three sources that Magnuson used, and also consulted the defendant's informational reference library, commonly known as the "morgue," and obtained all the materials relating to Frank Pape and the case of Monroe v. Pape, 365 U. S. 167 (1961). Stipulation, ¶¶ 25 and 26; DX I through DX P. In order to determine what information was available to the defendant, it will be necessary to examine some of these documents in more detail.

The article from the New York Post of Monday, February 27, 1961, DX I, purported to be a first person account by James Monroe of the events surrounding his arrest and subsequent release. The article does not state explicitly that Monroe's statements were merely allegations in a complaint, and the facts related by Monroe follow substantially the account given by Magnuson in the accused article. However, it should be noted that in the introductory paragraphs, the Post said that the narrative which followed was in Monroe's own words and was his "recollection of what happened." The introduction also points out that the Supreme Court has only allowed Monroe to "sue 13 white policemen for abusing him and his family," and that, impliedly, the actual facts might not be as described in the narrative.

The New York Times article (DX P) of February 21, 1961, sounds a similar cautionary note. It said that "[a] Chicago Negro handyman, James Monroe, brought the case after thirteen city policemen broke into his apartment early one morning. He said that they hit him, made him and his wife stand naked while they searched the apartment without a warrant, then held him illegally in jail before finally releasing him without charges." (Emphasis added.) The reference to the fact that a case

was brought, and that Monroe "said" that he had been abused highlight the apparent lack of certainty which the New York Times evidenced. Exhibit L also emphasized the fact that Monroe only "claimed" that certain facts were true, and this exhibit was a dispatch from Time's Chicago Bureau correspondent, Dudley Doust. Doust filed another report, one day later than Exhibit L, in which he did not mention that Monroe was only "claiming" that the incidents occurred (DX J). The account in this exhibit did support the statements as made in the accused article. The other articles refer to the decision in Monroe v. Pape, supra, and do not otherwise discuss the facts, or, they refer to the plaintiff as being an "ungodly tough," but much-decorated police officer. DX K, DX M and DX N.

The Seventh Circuit Court of Appeals, albeit before the St. Amant decision, supra, had determined that the defendant, when it reworded parts of the Justice report, took the risk that it "might go too far," and indicated that a jury, on the facts before it, could decide that the defendant's acts were "reckless." Pape v. Time, Incorporated, 318 F. 2d 652, 655 (7th Cir. 1963), as quoted in Pape v. Time, Incorporated, 354 F. 2d 558, 560 (7th Cir. 1965). However, the court did not have the complete record before it, as is presently the situation before this court.

Even though the defendant showed at trial that the Monroes recovered an $8,000 judgment against the plaintiff for violating their civil rights, this court assumes for the purpose of argument, that the plaintiff has established, through the eight police officers' testimony, that the statements in the article were substantially false. Even assuming this, the plaintiff has the burden of proving "with convincing clarity" that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and

dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as "substantially" true. This case is far easier than the New York Times v. Sullivan case, supra, where there was no investigation whatsoever into the truth or falsity of the advertisement's representations. This case also does not fall within the St. Amant description of what kinds of publications fell outside the protections of the First Amendment. There the court said, at 732:

> "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of facts must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." (Emphasis added.)

This decision, after the cases in the Seventh Circuit, indicates that where good faith can be shown, as here, and there has been no "fabrication," etc., the First Amendment demands that judgment be rendered for the defendant publisher. Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a "chilling effect" on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of

a publication to enter into expensive litigation, Dombrowski v. Pfister, 380 U. S. 479 (1965) as cited in Time, Incorporated v. McLaney, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969).

At the close of plaintiff's case, defendant moved for a directed verdict. The court might well have granted this. However, in the exercise of extreme caution and with due regard for the statements made by the Court of Appeals in the other Pape cases, supra, the court decided to wait until all of the evidence was in and a complete record was made. At the conclusion of the introduction of all the evidence, any lingering doubt that the court may have had was completely eliminated.

It is therefore ordered that the defendant's motion for a directed verdict at the close of all the evidence be, and it is hereby granted.

It is further ordered that judgment be and it is hereby rendered for the defendant on the issue of liability, and the cause is hereby dismissed without costs.

/s/ Edwin E. Robson,
Judge.

January 16, 1969

IN THE UNITED STATES DISTRICT COURT.
• • (Caption—No. 61 C 2202) • •

NOTICE OF APPEAL.

(Filed Feb 14 1969)

Notice Is Hereby Given that Frank Pape, Plaintiff, above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order of this Court that the Defendant's motion for a directed verdict at the close of all the evidence be granted and that judgment be rendered for the Defendant on the issue of liability, which order and judgment was entered in this action on the 16th day of January, 1969.

FILE COPY

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No. ~~1000~~ 109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, granting the Motion of Petitioner, Time, Inc., for a Directed Verdict is reported in *Pape* v. *Time, Inc.*, 294 F. Supp. 1087 (1969), and is reproduced as Appendix "A", *infra.*

The first opinion of the Seventh Circuit is reported in *Pape* v. *Time, Inc.*, 318 F. 2d 652 (1963), and is reproduced as Appendix "B", *infra.* The second opinion of the Seventh Circuit is reported in *Pape* v. *Time, Inc.*, 354 F. 2d 558 (1965), and is reproduced as Appendix "C", *infra.* The third opinion of the Seventh Circuit, the review of which is now sought, is presently unreported; it is reproduced as Appendix "D", *infra.*

JURISDICTION.

The decision of the Seventh Circuit was rendered on December 15, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

The District Court granted a directed verdict for the defendant publisher at the close of all the evidence on the ground that the plaintiff, a public official under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), had failed to sustain his First Amendment burden of proving with convincing clarity that an allegedly libelous news article was published with actual malice, *i.e.*, knowledge of falsity or serious doubts as to the truth.

The Court of Appeals reversed, holding that the writer's editorial decision to omit the word "alleged" in describing charges of misconduct against the plaintiff in an official Report of the U. S. Commission on Civil Rights was alone sufficient to permit a jury finding of actual malice.

The question presented is whether the Court of Appeals erroneously construed and applied the First Amendment test of actual malice formulated in *New York Times* and its progeny by considering only one isolated fact in the entire editorial process of writing and researching the article and by substituting the Court's editorial judgment and discretion for that of the writer.

STATEMENT OF THE CASE.

(a) Introduction—History of the Suit.

This is a suit for libel instituted against petitioner Time, Inc. by Captain Frank Pape of the Chicago Police Department. The alleged libel appeared in a news article in *Time* magazine on November 24, 1961. Time, Inc. originally moved to dismiss Pape's suit on the grounds that the article was a fair report of an official governmental document and was fair comment thereon. The District Court granted the motion and dismissed the cause. The Seventh Circuit reversed and remanded (with one Judge dissenting); the Seventh Circuit ruled that because of the article's omission of the word "alleged" in describing charges of official misconduct by Pape in a civil rights suit discussed in the 1961 annual Report of the U. S. Commission on Civil Rights, the article could be found by a jury to exceed Illinois common law bounds of fair report and comment. *Pape* v. *Time, Inc.*, 318 F. 2d 652, *cert. denied*, 375 U. S. 902 (1963). The opinion is reproduced as Appendix "B", *infra*.

After remand, this Court decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Time, Inc. thereafter deposed Captain Pape and moved for summary judgment. The motion contended that Pape was a *New York Times* public official and could not sustain his First Amendment burden of proving actual malice. The District Court granted the motion, but on appeal the Seventh Circuit again reversed. The Court held that although Captain Pape was a public official under *New York Times*, on the record then before the court (*i.e.*, Pape's deposition) the failure of Time, Inc. to use the word "alleged" in reporting the Civil Rights Commission's discussion of the action against Pape required a trial. *Pape* v. *Time, Inc.*, 354 F. 2d

558, *cert. denied*, 384 U. S. 909 (1965). The opinion is reproduced as Appendix "C", *infra*.

The case was remanded to the District Court and a full jury trial ensued. At the close of all the evidence, the District Court granted a directed verdict in favor of Time, Inc.; the Court ruled that Captain Pape had failed to sustain his First Amendment burden of proving actual malice as required by *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) and its progeny (Appendix "A", *infra*). On appeal, the Seventh Circuit reversed a third time, holding that because of the article's omission of the word "alleged" Pape had made a sufficient showing of actual malice to go to the jury. (Appendix "D", *infra*.)

(b) The Background of Pape's Libel Suit: Monroe v. Pape.

In 1961, this Court decided *Monroe v. Pape*, 365 U. S. 167. The Court held that the plaintiffs, Mr. and Mrs. James Monroe and their six children, were entitled to sue Captain Frank Pape under the Civil Rights Act (R. S. § 1979, 42 U. S. C. § 1983) for constitutional violations claimed to have been committed during a pre-dawn police invasion of the Monroes' apartment. Captain Pape at the time was Deputy Chief of Detectives of the Chicago Police Department and personally led the Monroe raid. (App. 137-141, 145.)[1] The Monroes charged that Pape and his squad of detectives entered the apartment without a warrant, roused the family from bed at gunpoint, forced Mr. and Mrs. Monroe to stand naked in the living room, ransacked the apartment, physically abused Mr. Monroe and the children, and held Mr. Monroe incommunicado at the police station for ten hours.

1. "App." citations herein refer to the printed Appendix filed by respondent Pape in the Court of Appeals and now lodged with the Clerk of this Court.

After this Court held that the Monroes' complaint was cognizable under the Civil Rights Act, Pape was tried by jury; the verdict was guilty and a judgment for $8,000 was entered against Pape on January 24, 1963. Pape did not appeal and the judgment was satisfied.

(c) The 1961 Report of the U. S. Commission on Civil Rights—JUSTICE.

Subsequent to the decision of this Court in *Monroe* v. *Pape* but *prior* to the trial, the U. S. Commission on Civil Rights issued its official 1961 Annual Report. The Civil Rights Commission was created by Congress in 1957 to investigate civil rights problems and make recommendations to the President and Congress (42 U. S. C. § 1975). The Commission's declared purpose is "to collect, study, and appraise information relating to civil rights throughout the country and to make appropriate recommendations to the President and Congress for corrective action." (Vol. 5, 1961 Report, p. ix).

Volume 5 of the Commission's 1961 Report—JUSTICE—contains the Commission's observations and findings concerning *Monroe* v. *Pape*. Chapter 2 of JUSTICE, entitled "*Unlawful Police Violence*" (with the sub-title "*Patterns of Police Brutality*"), cites and discusses *Monroe* v. *Pape* as one of eleven specifically enumerated examples of nationwide police brutality against Negroes. The Commission prefaces Chapter 2 with the statement that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; *in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations.* In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. *The Commission is of the opinion*, how-

ever, that the allegations appeared *substantial enough* to justify discussion in this study." (Emphasis added.)

"*Unlawful Police Violence*" (Chapter 2) is divided into four separate classifications of police brutality: (1) racially motivated brutality to enforce segregation; (2) violence as punishment; (3) coerced confessions; and (4) the spontaneous use of force in making arrests. The *Pape* case is included within the fourth category as a spontaneous use of force; the Commission introduces the *Pape* case by the italicized subheading, *Search, seizure, and violence: Chicago 1958.* JUSTICE then summarizes the factual predicate for the *Pape* case by quoting Mr. Justice Frankfurter's language in his dissenting opinion in *Monroe* v. *Pape*, 365 U. S. at 203-04. The Commission's exact language concerning Pape (including footnotes) reads:

"**UNLAWFUL POLICE VIOLENCE**

* * * * *

"**Patterns of Police Brutality**

* * * * *

"*Initial Contact and Arrest*

* * * * *

"*Search, Seizure and Violence: Chicago, 1958.* The Supreme Court of the United States decided the case of *Monroe* v. *Pape*[82] on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[83]

> "* * * [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of

> the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on 'open' charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family without criminal charges having been filed against him.

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82. 365 U. S. 167 (1961). See discussion in ch. 5 at 72-73, *infra*.

83. These are the words of Justice Frankfurter in dissent, 365 U. S. at 203-204."

(Commission footnote 82 alludes to another discussion by the Commission of *Monroe* v. *Pape* in Chapter 5 of JUSTICE; Chapter 5 discusses the probable effect of the decision in securing redress of future police brutality and violations of civil rights.)

The conclusions of the Commission from its investigation of police brutality towards Negroes are presented in Chapter 8 of JUSTICE. The Commission recommended to the President and Congress in that Chapter that specific remedial Civil Rights legislation be enacted to discourage and punish police violations of civil rights throughout the country (both in the South and North) (JUSTICE, pp. 105-13). JUSTICE was signed by all six of the Members of the Civil Rights Commission.

(c) The Time Article.

The *Time* article of which Pape complains is a report of the issuance of JUSTICE and reads as follows:

> CIVIL RIGHTS.
>
> Dawdling on the Corner.
>
> The new paperback has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission.*
>
> The bluntly frank report tells of a police officer referred to only as "Y," in Dawson, Ga., who arrested Negro James Brazier for speeding in November 1957. It quotes Brazier: "When I first entered the door of the jail, 'Y' hit me on the back of the head and knocked me down and said 'You smart son-of-bitch, I been wanting to get my hands on you for a long time.' I said, 'Why you want me for?' 'Y' said, 'You is a nigger who is buying new cars and we can't hardly live. I'll get you yet.'" When Brazier was arrested again five months later by the same officer, Brazier's wife related: "'Y' then said, 'I told you I would get you.' James said, 'What do you want to hurt me for? I ain't done nothing. I got a heap of little chillun.' 'Y' said, 'I don't give a goddam how many children you got, you're going away from here.' 'Y' pulled out his pistol and stuck it against James' stomach."
>
> Beaten to Death. Continues the report: "Brazier's ten-year-old son pleaded with the officers to stop beating his father and was knocked to the ground by 'Y'; the victim was thrown onto the floor of the police car with his legs dangling outside. 'Y' kicked him twice in the groin, slammed the door on his legs, threw a hat full of sand into his bloody face, and drove off."

Brazier died five days later, and "Y" was never punished.

Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice,* "broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers." The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment.

Nursing and Flouting. The commission's report concedes that such cases may be "more dramatic than most," but it declares that police brutality is "a serious problem throughout the U. S.," that Negroes suffer from it most, and that "there are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes." To remedy the situation, the commission recommends federal grants to upgrade state and local police forces, a federal law permitting police victims to sue local governments instead of only the officers, who can seldom pay adequate judgments, and an amendment to federal law specifically banning police brutality and forced confessions.

Going beyond the report of the panel, Father Hesburgh issued a separate statement: "Personally, I don't care if the U. S. gets the first man on the moon if while this is happening on a crash basis we dawdle along here on our corner of the earth, nursing our

prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hyocrites to all the world."

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* Members of the scholarly panel: Chairman Dr. John A. Hannah, president of Michigan State University; Dr. Robert S. Rankin, chairman of Duke University's political science department; Robert G. Storey, former dean of the Southern Methodist University Law School; Spottswood W. Robinson 3rd, dean of Howard University Law School; Erwin N. Griswold, dean of Harvard Law School; the Rev. Theodore M. Hesburgh, president of Notre Dame University.

Pape claims that the article was false, libelous and published with actual malice because it stated, "The police, says JUSTICE, 'broke through two doors, [etc.]" instead of stating that the described acts of misconduct were merely unsubstantiated allegations in a complaint.

(d) Time's Editorial Process in the Writing and Researching of the Article.

The article was written by Edward F. Magnuson, a contributing editor for the National Affairs section of Time.[2] Before writing the article, Magnuson had read the entire JUSTICE Report; he also had read a press release of the Civil Rights Commission concerning JUSTICE and two current articles in the *New York Times* discussing JUSTICE's contents (Defendant's Exhibits "E", "G" and "H").

Magnuson testified that his journalistic purpose in writing the article was to report the news of the findings of a high level governmental commission (App. 248). Magnuson

2. Magnuson is a graduate of the Journalism School of the University of Minnesota. Before joining the staff of *Time* Magnuson worked for ten years as a reporter for the *Minneapolis Tribune* where he covered a variety of assignments, including the police beat (App. 246).

believed at the time he wrote the article that all the findings of the Commission and the incidents set forth in JUSTICE were true and reliable (App. 248-49). He testified that he specifically relied on the statements by the Commission in its Preface to Chapter 2 of JUSTICE that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations" and ". . . the allegations [of misconduct] appeared substantial enough to justify discussion in this study" (App. 250-51).

Magnuson was asked why he did not state that the Pape episode was included in JUSTICE as simply allegations in the Monroes' complaint and instead wrote that JUSTICE said Pape did the things set forth in the complaint. Magnuson testified (App. 253-54):

> "Q. You understand the word 'complaint'?
> "A. That's right.
> "Q. You understand the word 'alleged'?
> "A. That's right.
> "Q. Therefore, while you did not find the word 'alleged' in the running head, 'Search, Seizure and Violence: Chicago, 1958', you did find it in the body, is that right?
> "A. I did, sir, yes; right.
> "Q. You found the word 'complaint'?
> "A. That's right.
> "Q. That said something to you other than the lack of the word 'alleged' in the title 'Unlawful Police Violence'?
> "A. *But the word 'alleged' there cannot be taken just in that context. It has to be taken in the context of the entire chapter.*"
>
> • • • • •
>
> "By Mr. Kaveny: Q. Well, I will read it again, sir. It says, '. . . on the basis of a complaint which alleged . . .'

"Mr. Reuben asked you a moment ago to tell us what you thought, so suppose you now tell me what you think. What did you think when you read, '. . . on the basis of a complaint which alleged . . .'? Tell us what that means to you.

"A. That means to me that the Commission in this case is reporting this incident in terms of a claim being made in a court by the Monroes, but you can't stop there.

"A. That does not tell me, sir.

"The Court: Let the witness finish answering. Proceed.

"By the witness: A. (Continuing) But in the context of the entire chapter, it is not a simple allegation because the Commission has also said that we will not include just an allegation that we have not verified in some fashion.

"Q. That is your conclusion from having read, '. . . on the basis of a complaint which alleged . . .'?

"A. I read the entire chapter.

"Q. There is more here than just an allegation or a complaint?

"A. In the context of this report there is more than an allegation involved here; that's right."

Magnuson further testified (App. 250-51):

"Q. What else within the four corners of Justice made you think that the report from Justice was true?

"A. Well, for one thing, the title of this chapter is 'Unlawful Police Violence.' It does not say 'Alleged Police Violence.' Then they go onto a subheading which says, 'Patterns of Police Brutality.' There is nothing about alleged, nothing about any doubts in the Commission's mind. The reference to the Pape incident is called, 'Search, Seizure and Violence in Chicago.' There is nothing about its being alleged or in any way doubtful, so this led me to think that it was entirely, convincingly true.

* * * * *

"Q. Did you believe that your article, when it appeared in *Time* magazine, was true?
"A. I certainly did."

After writing the article, Magnuson sent it to the Time research department to be checked for factual accuracy in accordance with Time's standard editorial procedure. The article in the normal course was assigned to Time researcher Karen Booth. Mrs. Booth testified that she read JUSTICE and then found and examined the following materials in Time's editorial reference file (commonly called the "morgue"):

(1) A *New York Post* article published February 27, 1961 in that newspaper and headlined "The Suit Against the Chicago Cops: A Father Recalls His Night of Terror" (Def. Ex. "I", App. 272, 378). The article, in James Monroe's own words, relates that Pape and his men woke Monroe by sticking guns in his chin, paraded him naked in front of his family, called him a "black son of a bitch" and "nigger", tripped and kicked one of the children; the article describes the ransacking of Monroe's apartment and quotes Pape as saying "If it's the last thing I do, I'm going to kill them two black niggers."

(2) A Time correspondent's private report from Chicago dated February 22, 1961 entitled "A Kicked-In Door (Take One)" (Def. Ex. "J", App. 273, 380). The detailed account of Pape's raid on the Monroe family filed by Time's Chicago correspondent after an independent investigation of the incident includes the statements that Monroe's son was knocked to the floor with the butt of a pistol as he opened the rear door for Pape and his men; the police forced Monroe naked from bed at

gunpoint; Mrs. Monroe was "snatched" naked out of bed with only a blanket wrapped around her; her closet and dresser was ransacked and the mattresses ripped open in the bedrooms during the search. The dispatch states that police cursed the children and the Monroes and when one of the girls tried to leave and call the police she was knocked down by one of the officers.

(3) A Time Washington correspondent's report dated February 22, 1961, entitled "Supreme Court" (Def. Ex. "K"). That report discusses the Supreme Court opinion in *Monroe* v. *Pape* and its consequences.

(4) A suggested news article by Time's Chicago correspondent, February 21, 1961, entitled "Terror On Trumbull Street" (Def. Ex. "L", App. 273, 390). Time's Chicago correspondent suggested "a look at this horror story" behind the *Monroe* v. *Pape* Supreme Court case including "brutal abuse, ransacking, false arrest, death threats."

(5) A report from Time's Washington Correspondent filed February 20, 1961, captioned "The Supreme Court" and "Another Monroe Doctrine" (Def. Ex. "M", App. 274, 391). The dispatch suggests a story on the *Monroe* v. *Pape* case and refers to the humiliation of Chicago Negro James Monroe in front of his wife and children as he was arrested and his apartment ransacked by Pape and 13 police officers.

(6) A 1951 report by Time's Chicago correspondent entitled "Chicago Cop" (Def. Ex. "N", App. 274, 392). This report refers to an incident prior to Pape's raid on the Monroes where Pape shot and killed a Chicago hoodlum, the sixth such person Pape has shot in the line of duty.

(7) A newspaper clipping dated December 21, 1947, headlined "THIS DEAD-EYE DICK POISON TO HOODLUMS" (Def. Ex. "O", App. 273, 393). This article in Time's morgue file describes Pape's shooting of his fourth victim in the line of duty; when a fleeing accused murderer lunged at Pape, Pape shot and killed him.

(8) A *New York Times* article February 21, 1961, entitled "High Court Backs Suing of Police" (Def. Ex. "P", App. 275, 394). The article recites the claims that Pape and twelve police officers broke into Monroe's apartment at 5:45 A.M., hit Monroe, made him and his wife stand naked while they searched the apartment without a warrant, then held Monroe illegally before releasing him without charges.

Mrs. Booth testified unequivocally that on the basis of her research of Time's files and her review of the entire JUSTICE report concerning police brutality, she was convinced that the Time article as printed was true (App. 271, 278-279).

Pape's evidence at the trial consisted of his testimony and the tesimony of his fellow police officers who had conducted the raid on the Monroes' apartment; the thrust of this evidence was that the police conducted the entry and search of the Monroe apartment and the arrest of Mr. Monroe in a gentle and polite fashion, without any physical or verbal abusiveness. Pape testified that the raid occurred because Mr. Monroe had been identified as a suspected murderer, a charge that later proved to be false. Apart from the cross-examination of Edward Magnuson and Karen Booth, Pape made no attempt to offer any evidence that the article was published with knowledge of falsity or with serious doubts as to its truth.[3]

3. The testimony of Mr. Magnuson in this regard is set forth at pp. 11-13, *supra*.

(e) The Directed Verdict in Favor of Time, Inc.

At the close of all the evidence, Time moved for a directed verdict on the ground that Pape had failed to meet his burden of proving actual malice as required by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) and later cases. The District Court granted the motion and directed a verdict for Time. In a Memorandum Opinion (Appendix "A", *infra*), the District Court thus explained the reasons for granting a directed verdict:

> ". . . [T]he plaintiff has the burden of proving 'with convincing clarity' that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as 'substantially' true. This case is far easier than the *New York Times* v. *Sullivan* case, *supra*, where there was no investigation whatsoever into the truth or falsity of the advertisement's representations. This case also does not fall within the *St. Amant* description of what kinds of publications fell outside the protections of the First Amendment.
>
> • • • • •
>
> "Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a 'chilling effect' on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publication to enter into expensive litigation. *Dombrowski* v. *Pfister*, 380 U. S. 479. . . ."

The Seventh Circuit reversed and remanded, holding that Pape had sustained his *New York Times* actual malice burden so that the case should go to the jury (Appendix "D", *infra*).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Seventh Circuit is diametrically in conflict with this Court and other Circuits in defining and applying the First Amendment concept of *New York Times* actual malice. The Seventh Circuit has isolated and focused entirely upon one single factor to find actual malice, to the complete exclusion and disregard of all other evidence concerning the editorial methodology followed in preparation of the article and the uncontradicted beliefs of the writer and researcher that it was true. Even the most cursory reading of the trilogy of opinions of the Seventh Circuit in this case (Appendixes "B", "C" and "D" *infra*) plainly reveals one dogmatic and unswerving thesis, *i.e.*, that Time's omission of the word "alleged" in describing JUSTICE's account of the *Monroe* v. *Pape* episode is sufficient, *standing alone*, to allow a jury to find Time guilty of libel. Other *New York Times* decisions have rejected such a constrictive approach and have held that all evidence pertaining to the publication and its origin must be considered to establish actual malice with the "convincing clarity" required by the First Amendment.

The first Seventh Circuit opinion, written *prior* to *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), stated that under Illinois common law rules of libel a jury could hold *Time* liable because it "could read the *Time* article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did.*" (Appendix "B", *infra* p. 6b.) Then, after the *New York Times* case had discarded common law libel concepts in favor of the First Amendment test of actual malice, the Seventh

Circuit in its second opinion purported to pay obeisance to *New York Times* and then ruled that omission of the word "alleged" in the *Time* article was sufficient to permit a jury to find *Time* guilty of *actual malice, i.e.*, "recklessness." In so holding, the Seventh Circuit quoted and relied upon the statement in its first and common law opinion declaring that *Time's* omission of the word "alleged" was sufficient to allow a jury to find a libel under the pre-*New York Times* rules. (Appendix "C", *infra*, p. 6c.)

Now, after a full trial on the merits of the constitutional issue of actual malice, the Seventh Circuit has again held unequivocally that omitting the word "alleged" *alone* constitutes a sufficient showing of actual malice to go to the jury. (Appendix "D", *infra*.) Despite the manifest and uncontradicted editorial belief of the writer that the article was true, and despite the unchallenged independent verification and corroboration of the article by the researcher, the Seventh Circuit has held that *Time* can be found guilty of actual malice because the writer truly reflected his conviction of truth and did not presume the reported charges against Pape were false because they were not yet supported by a jury verdict or judgment. In sum, the Seventh Circuit finds actual malice demonstrated because it disagrees with the author's editorial decision not to use the word alleged to express his good faith belief and understanding of the import of the Commission's JUSTICE Report.

We submit that there could not be a clearer or more direct conflict between the decision of the Seventh Circuit and the holdings of this Court and other Circuits. The importance of the issue presented clearly transcends the private interests of the parties and the scope of the special facts of the case. Involving, as it does, the con-

troversial role of the police and the civil rights movement in Chicago, the decision of the Seventh Circuit we believe cries out for review by this Court. If allowed to stand, the Seventh Circuit's decision will have precisely the "chilling effect" upon the exercise of preferred rights of free public discussion and debate that *New York Times* and its progeny were intended to remove. See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 566 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969). The principles and objectives of the First Amendment compellingly favor a grant of certiorari in this cause to review and set aside the Seventh Circuit's holding.

I. THE SEVENTH CIRCUIT'S HOLDING DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

(a) The Conflict With This Court's Decisions.

The fundamental concept of actual malice as enunciated in *New York Times* requires a public official plaintiff, such as Pape, to prove "with convincing clarity" that the alleged libel was published "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U. S. at 280.) This Court has subsequently amplified and elaborated the *New York Times* definition of actual malice in a series of decisions beginning with *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

In *Garrison*, the Court held that the "recklessness" concept of malice requires a showing of "a high degree of awareness of probable falsity" (379 U. S. at 67). In *Henry* v. *Collins*, 380 U. S. 356 (1965), the Court held that "intent to harm" does not suffice—there must be "intent to harm *through falsehood*" (emphasis added); the Court based its reversal of the *Henry* libel judgment on a jury instruction that erroneously allowed the jury to *infer* malice solely

"from the falsity and libelous nature of the statement" (380 U. S. at 357). Then, in *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967), the Court ruled that the failure of the defendant to make an investigation prior to publication is insufficient to constitute "recklessness." Finally, and most significantly, the Court held in *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), that the concept of recklessness requires a showing by the plaintiff that the defendant "*in fact entertained serious doubts as to the truth*" of the publication (390 U. S. at 730; emphasis added).

The decision of the Seventh Circuit is, we submit, at complete loggerheads with every pronouncement of this Court on the subject of *New York Times* actual malice, beginning with the *New York Times* case itself. Indeed, the evidence that the Court held insufficient in *New York Times* to support a finding of actual malice was manifestly stronger than that adduced by Pape below. Thus, in *New York Times* the trial record disclosed:

> *First:* The *New York Times* had evidence in its own files (from news material it had previously published) demonstrating the falsity of several statements in the publication (376 U. S. at 263, 287-88).
>
> *Second:* The Secretary of the New York Times Company admitted he could readily discern that on its very face at least one statement in the publication was false (376 U. S. at 263-64).
>
> *Third:* The *New York Times* accepted and published the assailed advertisement without checking its accuracy against *anything*—either outside sources or the paper's own files (376 U. S. 287).

Upon such a showing, the Court held that the *Times* could not be found guilty of actual malice because the evidence would support "at most a finding of negligence" (376 U. S. at 288). In the case at bar, we submit that the

evidence *a fortiori* could not support a finding of actual malice, or for that matter even negligence. Here, the writer of the article, Edward Magnuson, was convinced that his description of the JUSTICE Report's narration of the Pape episode was true, and that omission of the word "alleged" was without editorial significance in light of the entire context of Chapter 2 of JUSTICE, including its preface, headings and sub-heads (see Statement of the Case, *supra*, pp. 12-13). So also, in marked contrast to the *New York Times'* complete *lack* of research or verification, the article in this case was submitted to a Time staff researcher, Karen Booth, and was comprehensively checked and verified with the materials in Time's "morgue" or reference file concerning Pape and *Monroe* v. *Pape*, all of which were consistent with the article's contents (see Statement of the Case, *supra*, pp. 13-15).

The Seventh Circuit disregarded this entire methodology of the writer and researcher and focused solely upon the omission of the word "alleged"; if this Court had followed the same approach in *New York Times* and looked at only one fact (such as the materials in the *Times'* files) the Court clearly would have found a sufficient basis for a finding of actual malice. Instead this Court considered *all* of the facts concerning the method and process followed in making the publication and held that there was no actual malice as a matter of law.

The decision below also squarely conflicts with *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). There the record revealed that the defendant publisher had made *no* attempt to check or verify the truth of the alleged libel, had *no* knowledge of the plaintiff's past conduct, and had relied solely on the affidavit of a stranger whose veracity and credibility were unknown. This Court nonetheless held that the plaintiff had failed as a matter of law to make a submissible showing of actual malice in the sense of "reckless-

ness"; the Court declared that recklessness requires proof that the defendant "*in fact entertained serious doubts* as to the truth" of the alleged libel (390 U. S. at 730; emphasis added). Here, we submit, Pape has made not the remotest showing that either the writer, the researcher or anyone at Time, Inc. entertained "serious doubts as to the truth" of the *Time* article.

So also, the Seventh Circuit's decision is in flat conflict with *Beckley Newspaper Corp.* v. *Hanks*, 389 U. S. 81 (1969). In *Beckley* the defendant newspaper had accused the plaintiff of intimidation, threats and other misconduct as a public official; defendant admitted that (unlike in the instant case) *no* research or investigation had been conducted concerning the accusations, and that they were published because defendant believed there was a *possibility* they were true. This Court, in reversing a judgment for the plaintiff *per curiam*, considered the entire record and held that the evidence was insufficient to present a jury question of whether defendant acted recklessly. Again, the proof of actual malice in the instant case falls palpably short of the evidence held insufficient to go to the jury in *Beckley*. Here the article was comprehensively researched in accordance with Time's standard editorial procedure, and both the writer and the researcher believed the article *was in fact true*, not merely that there was a *possibility* it was true (as in *Beckley*).

Other holdings of this Court that we believe are at total odds with the Seventh Circuit's result below are *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Henry* v. *Collins*, 380 U. S. 356 (1965); *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U. S. 130 (1967) (Opinion of Mr. Justice Harlan). We respectfully submit that certiorari should be granted to review the Seventh Circuit's marked departure and regression from this Court's constitutional delineation of *New York Times* actual malice.

(b) The Conflict With Other Circuits.

The Seventh Circuit's approach in considering one single and narrow factor (omission of "alleged"), rather than *all* elements of the editorial process in writing and research of the article, is also in square conflict with the decisions of other circuits applying the *New York Times* doctrine. Virtually all other courts, both federal and state, have followed the constitutional mandate of *New York Times* and have examined *all* facts behind the preparation and writing of the publication in determining whether actual malice is a jury issue. Moreover, and signally, a cardinal feature of these decisions is their clear recognition that libel actions of public officials or public figures have a "chilling effect" upon the exercise of First Amendment rights of free public discussion and debate (see *Dombrowski* v. *Pfister*, 380 U. S. 479, 487 (1965)), and that such suits should be terminated as soon as possible when it appears that the plaintiff cannot sustain his burden of proving actual malice "with convincing clarity." This was clearly recognized by the District Judge below in his memorandum opinion granting Time, Inc.'s motion for a directed verdict (Appendix "A", *infra*):

> "Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a 'chilling effect' on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publication to enter into expensive litigation. Dombrowski v. Pfister, 380 U. S. 479 (1965), as cited in Time, Incorporated v. McLaney, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969)."

To minimize the "chilling effect" of libel suits on First Amendment rights, decisions of other circuits have held that defendant-publishers are entitled to summary judg-

ments or dismissals without the necessity of submitting the case to a jury when it appears on the basis of *all* affidavits, depositions or other adduced evidence that the plaintiff cannot sustain his burden of proving actual malice. Thus, in *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied* 395 U. S. 922 (1969), the defendant took an interlocutory appeal from the trial court's refusal to grant summary judgment against the plaintiff; the Fifth Circuit reversed and held that First Amendment considerations compelled immediate termination of the suit:

> "The subject matter of this litigation, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski* v. *Pfister,* 380 U. S. 479, because of the chilling effect of such litigation." (406 F. 2d at 566.)

In the *McLaney* case, the allegedly libelous article accused the plaintiff of being connected with organized crime and gambling in the Caribbean. The Fifth Circuit observed that a "substantial investigation" had been made into the truth of the alleged libel and that the author had no reason to have serious doubts as to the truth of the publication. Precisely the same is true, we submit, in the instant case.

An equally emphatic declaration of the "chilling effect" principle is *Washington Post Co.* v. *Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied* 385 U. S. 1011 (1967):

> "One of the purposes of the [New York] *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials,

is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes.* All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against the trial on the merits. *Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.* And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is hardly less virulent for being privately administered. *Smith* v. *People of State of California*, 361 U. S. 147 (1959)." (Emphasis added.)

To the same effect, and equally in conflict with the holding of the Seventh Circuit below, is *New York Times Co.* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966).

The recent case of *Wasserman* v. *Time, Inc.*, ... F. 2d ..... (D. C. Cir., Docket No. 23,267, decided March 3, 1970) also clearly highlights the fundamental error of the Seventh Circuit in applying the *New York Times* doctrine. Although the Court of Appeals in that case held that summary judgment was inappropriate on the pre-trial record then before the court (compare the second opinion of the Seventh Circuit in the instant case, Appendix "C", *infra*) the opinion of Judge J. Skelly Wright (concurred in by Judge Spottswood W. Robinson, III) clearly delineated the correct constitutional procedure for evaluating and determining whether a *New York Times* plaintiff has made a submissible showing of actual malice:

"In my judgment *New York Times Co.* v. *Sullivan*

makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard of the truth. * * *.

"If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the Times instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'

"This two-step procedure in which *both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff* provides the protection of the First Amendment freedom that Times sought to make secure in areas of public concern."

We submit that the Seventh Circuit's decision is also in conflict with *United Medical Laboratories, Inc.* v. *Columbia Broadcasting Systems, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied* 394 U. S. 921 (1969); *All Diet Food Distributors, Inc.* v. *Time, Inc.*, 56 Misc. 2d 821; 290 N. Y. S. 2d 445 (Sup. Ct. N. Y. Co., 1967); *Bon Air Hotel Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969); *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (Ct. App. 1966); *News-Journal Co.* v. *Gallagher*, 233 A. 2d 1966 (Sup. Ct. Del. 1967); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774 (D. C. Cir. 1968) *cert. denied*, 393 U. S. 884 (1969); *Walker* v. *Pulitzer Pub. Co.*, 394 F. 2d 800 (8th

Cir. 1968); *Ryan* v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Sup. Ct. Hawaii, 1968), *cert. denied*, 396 U. S. 822 (1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969).

(c) The Fundamental Misconceptions of the Seventh Circuit.

By concentrating entirely upon omission of the word "alleged"—an omission that was made by the writer in the sincere and undisputed belief that it was editorially irrelevant and in no way made the story untrue—the Seventh Circuit has undermined the central meaning and purpose of the *New York Times* doctrine and has created dangerous precedent in this critically important area of constitutional law. We submit this Court should forthwith rule that no court has the right to substitute its editorial judgment for that of a publisher; this clearly is the essence of First Amendment protection.[4] A good faith omission is as much entitled to constitutional protection as an outright falsity by erroneous statement. Does a publisher have the right in good faith to omit something that it believes to be editorially inconsequential? To state the question impels the answer—yet that is all that is involved in this case.

The Seventh Circuit's erroneous decision on the simple question stated above was based on two misconceptions, each basic to an understanding of the *New York Times* rule. First, it erroneously held that a knowledgeable editorial decision includes, by the very fact of knowledge of the decision (which any responsible journalist will always

4. The same question is involved in a case now pending before the Fifth Circuit Court of Appeals, *Ragano* v. *Time, Inc.* There the District Court (S. D. Fla.) refused to dismiss (302 F. Supp. 1005) but granted a motion for leave to appeal, which was also granted by the Court of Appeals. Briefs have been submitted but the case has not as yet been argued.

have), knowledge of falsity. Second, it erroneously held that a court is free to substitute its *own* editorial discretion for that of the publisher in making a judgment as to truth or falsity. Both conceptions are erroneous:

(1) Knowledge of falsity by reason of knowledge of omission.

The Seventh Circuit, in its anxiety to superimpose its own editorial judgment upon that of the Time writer and researcher, totally misapprehended the test it was required to apply in judging whether the publication was entitled to constitutional protection. Thus, in *New York Times*, this Court explicitly stated: "A defense for erroneous statements honestly made is no less essential here" (376 U. S. at 278.) and barred action on such statements, "believed to be true" (Id. at 279). Again, in *Garrison*, this Court stated that: "Utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth" (379 U. S. at 73).

The Seventh Circuit completely disregarded those utterances in reaching its conclusion that there was a basis for denial of constitutional protection; its conclusion was based solely upon the following statement:

> "However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit." (Appendix "A", *infra* at p. 4d).

All the court is saying is that Magnuson knew that he was omitting a fact. This does not cover the further, and essential point, that, in Magnuson's view (as testified at the trial) the omission of that fact made the story true. The essential inquiry is not whether Magnuson knew what he was doing—rather, it is whether Magnuson, knowing what he was doing, "honestly believed" in the truth of that which was said. What the Seventh Circuit in fact has

done after making its own editorial judgment of "falsification," is to find (without support) that the omission that led to its view of "falsification" was deliberate, and then bridge the gap of proof of lack of honest belief by a total *non sequitur, i.e.,* since what was said was false Magnuson failed to believe in the truth of what he said. That *non sequitur* is the crux of this case. One cannot infer knowledge of falsity from knowledge of an editorial decision deliberately to omit in order to print what the writer believed to be the truth. And that is the simple but basic question presented by this petition.

(2) The Circuit Court's unsound journalistic judgment—Time's version of what the Report said as a "falsification".

The Seventh Circuit's substitution of editorial judgment for that of the author and researcher was, as discussed above, totally in error and, in any event, the very fact that we make that point in this Court is sufficient to indicate that there is not and could not be on the part of Time a "high degree of awareness of probable falsity". We believe the Time story was true and constitutionally protected.

As confirmed in the press release issued by the Commission and used by Magnuson (App. 420-36) the Commission concluded that: "Indeed, a comprehensive review of available evidence indicates that police brutality is still a serious and continuing problem" (App. 421). That statement was corroborated by the specific finding to that effect set forth in the press release (App. 427). That same finding was included in the New York Times clip used by Magnuson (Ex. H, pp. 437-9). Is it believable that the United States Civil Rights Commission, with men of national eminence, would base a *finding* of police brutality on the mere allegation of a complaint?

Of course it is not conceivable and the reason that the

complaint's allegations were included in the Report was stated specifically by the Commission in its Introductory Remarks to the Chapter on "Unlawful Police Violence", *i.e.*, that the allegations had been investigated and "*the allegations appear substantial enough to justify discussion in this study.*" (Emphasis added.) Thus, on the face of the Report, it appeared that the quotations from the complaint were not inserted *qua* allegations of a complaint but, rather, as statements of fact that had been substantiated.

If Time, Inc. were to report on the Report, its report could hardly be "true" if it merely repeated the allegations of the complaint as being allegations of a complaint for, in truth, and as presented by the Commission in its complete Report, those allegations were allegations of fact which had been investigated and were substantial enough to merit a finding by the Commission of police brutality. To say, then, that Time's story was a "falsification of what the Report said", is far from the truth, for Time's story correctly reported and interpreted the thrust of the Report.

Moreover, Booth, the researcher, who re-checked Magnuson's judgment as to what the Report said, had available in her files, aside from the complaint in the *Monroe* action, proof of the truth of those allegations. Time's Chicago reporter Doust had reported in his dispatch of February 22, 1961 (Ex. J, pp. 380-83) the complete truth of the entire story and that dispatch was backed up by the New York Post clipping of February 27, 1961, used by Booth, quoting Monroe as to his side of the story in detail (Ex. I, pp. 378-9). And those facts were also substantiated by the dispatches of 3/24/51 and 12/21/47 (Exs. N, O, pp. 392-3), branding Pape as a "Killer Cop".

Moreover, the correctness of Time's view that the "allegations" spoke the truth and that the Commission's Report so reported them, was later confirmed by the fact of a

jury verdict against Pape and in favor of Monroe when the case was tried in court, as shown by the verdict itself (Exs. B, C, D—pp. 371-3) and the then current newspaper reports of that verdict (Exs. Q, R, S, T—pp. 395-8).

What more does one need to arrive at a belief of the truth? The Report on its face, as available to Magnuson and Booth and judged by them, was more than a report of mere allegations of a complaint. Booth knew that it was backed up by specific dispatches to the effect that the story was true. And, thereafter, a jury verdict found the story was true. To have published the story as suggested by the Court of Appeals in its opinion would have been poor journalism because it would have been untrue—and that is the very reason Courts should not attempt to be journalists and the very reason why the First Amendment bars such an attempt. If ever a man appeared to have been guilty of what was said, it was Pape, despite his protestations to the contrary. And if ever anyone acted "in good faith" and "honest belief" in truth, it was Magnuson and Booth. And that should be the end of the case under *New York Times*.

The District Court clearly agreed with this position, with the truth of the Time story and with Magnuson's "personal good faith" (App. 447). That agreement, it seems to us, is significant. If Time's position was sufficient to convince the District Court, that position even if erroneous as to the literal and technical truth of the story, can hardly give rise to that "high degree of awareness of probable falsity" needed in order to lose the protection of the Constitution. See the statement of Judge Skelly Wright in *Wasserman* v. *Time, Inc.*, quoted at pages 25-26, *supra*. A mere reading of the testimony of Magnuson (App. 248-262), plus the exhibits relied on by Booth (Exs. I-O, App. 378-393) should suffice to show their good faith. Apparently, the Seventh Circuit neglected to

read the record, despite the District Court's hearing and seeing the witnesses and exhaustive review of the testimony and exhibits.

II. THE GRAVELY CHILLING EFFECT OF THE SEVENTH CIRCUIT'S DECISION.

As previously discussed, both this Court and other Circuits have recognized and squarely held that avoidance of a chilling effect is necessary to maintain the vitality of the First Amendment. The instant case and the proceedings below place in bold relief the insidious and chilling effect of a failure to terminate a libel suit involving the public interest at the earliest possible moment. The petitioner has been in litigation since 1961 and has been required to defend extensive pretrial proceedings, a trial on the merits and three appeals. We believe that in light of the history of this cause and the present remand, allowing the Court of Appeals' decision to remain undisturbed must necessarily inhibit all but the hardiest of publishers. Indeed, in light of all that has transpired in the instant case, if, as we believe, the Seventh Circuit's decision below is in error, the necessary expense and travail that has and will transpire here must have a manifest chilling effect.

Moreover, and we think cardinally, if a jury trial is compelled in this case in contravention of the *New York Times* cases, the chilling effect upon publishers will be compounded incalculably. The 1968 Democratic Convention in Chicago has engendered strong and violent emotions in much of the City of Chicago concerning the role and conduct of police. Thereafter, the city was harshly divided by the September 1969 Weathermen convention and the December 1969 Black Panther investigation.

The recently concluded and much publicized Conspiracy Trial has increased this emotional pitch. At this time,

there would be scant few publishers that would not be reluctant to submit to a jury trial in a libel suit involving the conduct of Chicago police in Chicago in 1970. If the decision below is allowed to stand, many publishers in the future may well avoid the plight by simply not printing about Chicago, its police and its violence.

CONCLUSION.

For the reasons set forth above, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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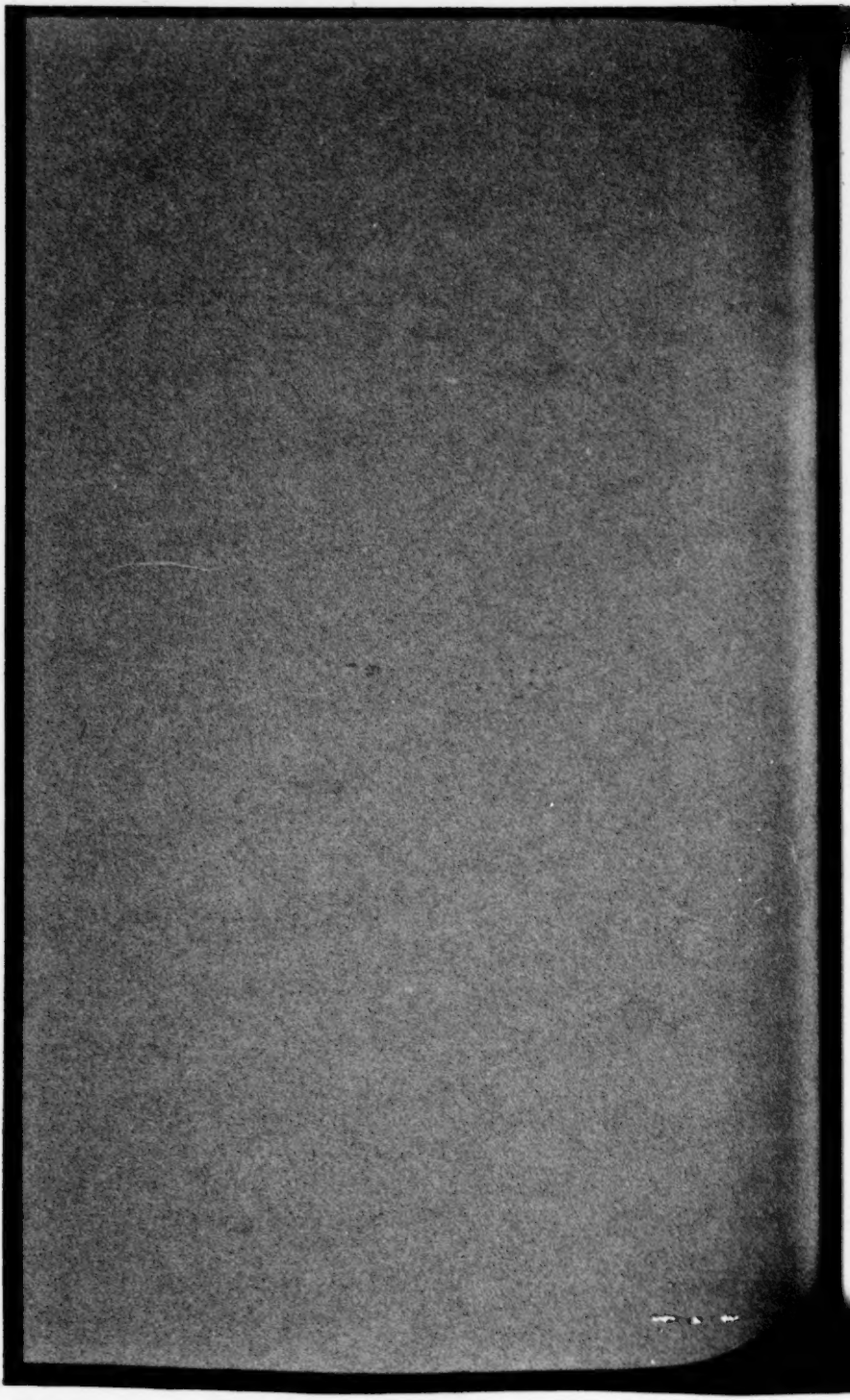
March 10, 1970.

Appendix



APPENDIX "A".

Opinion of the United States District Court for the Northern District of Illinois, Eastern Division.

FRANK PAPE, *Plaintiff*,

vs.

TIME, INCORPORATED, *Defendant*.

No. 61 C 2202.

THE HONORABLE EDWIN A. ROBSON, *District Judge*.

The defendant has moved for a directed verdict at the close of all the evidence. For the reasons set forth below, this court is of the opinion that the motion should be granted.

The plaintiff, Frank Pape, is suing Time, Incorporated for libel allegedly arising out of an article published November 24, 1961, which described the search of James Monroe's apartment on the west side of Chicago and Monroe's subsequent arrest by the plaintiff and seven fellow police officers. The plaintiff is a "public official," *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965), and in order for such a public official to recover a libel judgment against the present defendant, he must prove "with convincing clarity" that the article was false and was published with actual malice. *New York Times Co.* v.

Sullivan, 376 U. S. 254, 285-286 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). "Actual malice" has been defined as false statements published with knowledge that they are false, or with reckless disregard as to their truth or falsity. *New York Times* v. *Sullivan, supra.* "Reckless disregard" may be shown to exist where there exists "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant, supra,* at 731. In addition, "recklessness may be found where there are obvious reasons to doubt the accuracy of [an] informant or the accuracy of his reports." Id., at 732. In order to preserve First Amendment rights, it is clear that "some erroneous publications [must be protected] as well as true ones." In determining whether actual malice exists, the writer's personal belief that his story is true is important, but is only one factor to consider. Id., at 732.

In the article complained of in this case, the defendant's writer, Edward F. Magnuson, a veteran reporter, purported to quote part of the publication, Justice, which was compiled by the members and staff of the United States Civil Rights Commission. The portion of the article complained of is as follows:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says Justice, 'broke through two doors, woke the Monroe couple with flashlights, and forced them to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy." Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor.

> The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment." Time magazine, November 24, 1961, at 16.

This quote omits the words which immediately preceded it. The Justice report states that these were allegations contained in a complaint. This omission, which has been ruled to be at least "negligent," is not enough to sustain the plaintiff's burden of proof (as outlined above), since the standard for actual malice is far stricter than the standard for negligence. *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965). This court, therefore, must look further into the background of this article.

Mr. Magnuson testified that he read the omitted words, but decided not to include them in the article as it appeared in Time magazine. He explained the omission by pointing out that the Civil Rights Commission, appointed by the President, was set up by Congress to report on the problems of minorities, and its members were highly respected individuals. This meant to him, he testified, that if an example was used in the text of the report, it was considered by the Commission to be "substantially" true, no matter how the example was worded. In some of the examples, the words "alleged" or "allegation" were not used; in others, such as the one before this court, those words were used. Although the Justice report did warn that they had made no conclusive determination of the correctness of the statements of the complainants or officers, the report also said that "the allegations appeared substantial enough to justify discussion in this study." Justice, at 5. This statement modifies the whole report, and thereby makes almost all the examples contained in the report "allegations" of one sort or another, except where

(in two cases) convictions had been obtained. Therefore, the appearance of the word "alleges" at the beginning of the section in Justice describing the plaintiff's activities is not of controlling significance. It was undisputed in the record that Mr. Magnuson in personal good faith interpreted the word "alleges" in the light suggested above. Professions of good faith, however, may not be sufficient in certain cases. *St. Amant, supra.* It is vital to describe the research that went into this article.

It has been stipulated between the parties that Mr. Magnuson consulted three sources before he wrote the article: the Justice report itself, a press release issued by the Civil Rights Commission concerning its Justice volume (Defendant's Exhibit [DX] G), and a news article in the New York Times of November 17, 1961 (DX H). All of these, if they mention the Pape incident at all, refer to the fact that the statements were contained in a complaint. After the article was drafted, it was sent to Champ Clark, then editor of the National Affairs Section, who in turn, according to an established procedure, sent it to the defendant's Research Department. The article was checked for factual accuracy by Miss Karen Burger (now Mrs. Karen Booth), whose deposition was read in open court. Her job was to make corrections in consultation with the senior editor and the writer. She testified that she did not call the omission to their attention, since she had determined that the writer had good reasons for the omission and that the quote was factually accurate. In order to make this determination, she rechecked the three sources that Magnuson used, and also consulted the defendant's informational reference library, commonly known as the "morgue," and obtained all the materials relating to Frank Pape and the case of *Monroe* v. *Pape*, 365 U. S. 167 (1961). Stipulation, ¶¶ 25 and 26; DX I through DX P. In order to determine what information was available to the defendant,

it will be necessary to examine some of these documents in more detail.

The article from the New York Post of Monday, February 27, 1961, DX I, purported to be a first person account by James Monroe of the events surrounding his arrest and subsequent release. The article does not state explicitly that Monroe's statements were merely allegations in a complaint, and the facts related by Monroe follow substantially the account given by Magnuson in the accused article. However, it should be noted that in the introductory paragraphs, the Post said that the narrative which followed was in Monroe's own words and was his "recollection of what happened." The introduction also points out that the Supreme Court has only allowed Monroe to "sue 13 white policemen for abusing him and his family," and that, impliedly, the actual facts might not be as described in the narrative.

The New York Times article (DX P) of February 21, 1961, sounds a similar cautionary note. It said that "[a] Chicago Negro handyman, James Monroe, brought the case after thirteen city policemen broke into his apartment early one morning. He said that they hit him, made him and his wife stand naked while they searched the apartment without a warrant, then held him illegally in jail before finally releasing him without charges." (Emphasis added.) The reference to the fact that a case was brought, and that Monroe "said" that he had been abused highlight the apparent lack of certainty which the New York Times evidenced. Exhibit L also emphasized the fact that Monroe only "claimed" that certain facts were true, and this exhibit was a dispatch from Time's Chicago Bureau correspondent, Dudley Doust. Doust filed another report, one day later than Exhibit L, in which he did not mention that Monroe was only "claiming" that the incidents occurred (DX J). The account in this exhibit did support the state-

ments as made in the accused article. The other articles refer to the decision in *Monroe* v. *Pape, supra,* and do not otherwise discuss the facts, or, they refer to the plaintiff as being an "ungodly tough," but much-decorated police officer. DX K, DX M and DX N.

The Seventh Circuit Court of Appeals, albeit before the *St. Amant* decision, *supra,* had determined that the defendant, when it reworded parts of the Justice report, took the risk that it "might go too far," and indicated that a jury, on the facts before it, could decide that the defendant's acts were "reckless." *Pape* v. *Time, Incorporated,* 318 F. 2d 652, 655 (7th Cir. 1963), as quoted in *Pape* v. *Time, Incorporated,* 354 F. 2d 558, 560 (7th Cir. 1965). However, the court did not have the complete record before it, as is presently the situation before this court.

Even though the defendant showed at trial that the Monroes recovered an $8,000 judgment against the plaintiff for violating their civil rights, this court assumes for the purpose of argument, that the plaintiff has established, through the eight police officers' testimony, that the statements in the article were substantially false. Even assuming this, the plaintiff has the burden of proving "with convincing clarity" that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as "substantially" true. This case is far easier than the *New York Times* v. *Sullivan* case, *supra,* where there was no investigation whatsoever into the truth or falsity of the advertisement's representations. This case also does not fall within the St. Amant description of what kinds of publications fell outside the protec-

tions of the First Amendment. There the court said, at 732:

> "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." (Emphasis added.)

This decision, after the cases in the Seventh Circuit, indicates that where good faith can be shown, as here, and there has been no "fabrication," etc., the First Amendment demands that judgment be rendered for the defendant publisher. Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a "chilling effect" on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publisher to enter into expensive litigation. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), as cited in *Time, Incorporated* v. *McLaney*, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969).

At the close of plaintiff's case, defendant moved for a directed verdict. The court might well have granted this. However, in the exercise of extreme caution and with due regard for the statements made by the Court of Appeals in the other *Pape* cases, *supra*, the court decided to wait until all of the evidence was in and a complete record was made. At the conclusion of the introduction of all the evi-

dence, any lingering doubt that the court may have had was completely eliminated.

It is therefore ordered that the defendant's motion for a directed verdict at the close of all the evidence be, and it is hereby granted.

It is further ordered that judgment be and it is hereby rendered for the defendant on the issue of liability, and the cause is hereby dismissed without costs.

/s/ Edwin A. Robson,
Judge.

January 16, 1969.

APPENDIX "B".

First Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

v.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

April 25, 1963

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity libel suit charging that Time, Incorporated, publisher of a national weekly news magazine, defamed plaintiff Pape in an article based on *Justice,* volume 5 of the 1961 report of the United States Commission on Civil Rights.[1] The District

1. Created by the Civil Rights Act of 1957, 42 U. S. C. § 1975, to study civil rights problems and report to the President and Congress. The Supreme Court described the Commission's statutory duties in *Hannah* v. *Larche,* 363 U. S. 420, at 441 (1960):

> • • • its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Court dismissed the complaint on Time's motion, and plaintiff has appealed.

Time's motion admitted, for purposes of this appeal, the well pleaded facts: Plaintiff, at the time of the alleged libel, was Director of Security for Chicago Thoroughbred Enterprises, Incorporated, which operated race tracks in metropolitan Chicago. He was on leave from his position as a captain of Chicago Police. He enjoyed a good reputation.

In its issue of November 24, 1961, Time published the alleged defamatory matter in reporting the filing of *Justice* by the Commission. The material subject of suit appears under "Part VII. Equal Justice Under Law." In Part VII are two chapters: "1. Introduction; and 2. Unlawful Police Violence."

Chapter 2, "Unlawful Police Violence," briefly describes eleven typical cases of police brutality. The Commission states: "The allegations of misconduct are supported in several cases by criminal convictions * * * or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in the study."[2]

The Time article, captioned "Civil Rights—Dawdling on the Corner,"[3] was based on that part of Chapter 2 of the

2. 5 U. S. Comm. on Civil Rights Report 5 (1961).

3. The caption "dawdling on the corner" is taken from a separate statement filed in the Report by Reverend Theodore M. Herburgh, C. S. C., President of the University of Notre Dame, and a Member of the Commission. In part, Commissioner Hesburgh stated:

> Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis,

(Footnote continued on next page.)

Commission Report entitled "Patterns of Police Brutality." Time noted the publishing of *Justice* by the Commission and went on to report incidents in Georgia and Chicago, two of the eleven incidents revealed in the Commission Report. The Chicago incident involved the arrest by Pape and other Chicago police officers of a Negro family named Monroe on Chicago's west side.[4]

This District Court's opinion, sustaining Time's motion to dismiss, was that the article was a fair and accurate account of the Commission's Report, a matter of public interest and legitimate subject of comment of an honest purpose; and that the article did not exceed the bounds of fair comment and was not actionable.

The question is whether the District Court erred in finding, under Illinois law, that the complaint failed to state a claim upon which relief could be granted. The subordinate, vital question is whether Time's report of what the Commission said about the Pape incident is fair comment.

Time's article introduced the reader to *Justice* as carrying "a chilling text about police brutality" and that "it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission." The reader is told, in a footnote, who the noted educators

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we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world.

5 U. S. Comm. on Civil Rights Report 168 (1961).

4. Based on the alleged wrongful conduct of Pape and his fellow officers in making that arrest, Monroe brought a civil rights suit which, on appeal, *Monroe* v. *Pape*, 365 U. S. 167 (1961), was remanded for trial to the Northern District of Illinois, Eastern Division.

are.[5] Time's second paragraph begins, "The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Ga." This and the third paragraphs tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, "Brizier died five days later, and 'Y' was never punished." In the fourth paragraph Time reported the Pape incident.

The Pape incident is set forth in the Commission Report in this way:[6]

> *Search, seizure and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[7]
>
> . . . [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living rom; that Detective Pape struck Mr. Mon-

5. Members of the United States Commission on Civil Rights: Chairman Dr. John A. Hannah, President of Michigan State University; Vice Chairman Robert G. Storey, head of Southwestern Legal Center and former Dean of Southern Methodist University Law School; Reverend Theodore M. Hesburgh, President of the University of Notre Dame; Dr. Robert S. Rankin, Chairman of the Political Science Department, Duke University; Erwin N. Griswold, Dean of the Harvard University Law School; and Spottswood W. Robinson III, Dean of the Howard University Law School.

6. U. S. Comm. on Civil Rights Report 20, 21 (1961).

7. The Commission set forth the facts alleged in the complaint by quoting from Justice Frankfurter's dissent in *Monroe* v. *Pape*, 365 U. S. 167, 202-259 (1961).

roe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.

Time began its report of the Commission's statement of the Pape incident this way: "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder." It continued: "The police, says *Justice*, broke through two doors * * *." Time then quoted the rest of the statement of the Commission verbatim. The Time paragraph concludes: "The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

We agree with the District Court that Time was not absolutely privileged in writing the article. The absolute privilege of the Commission did not protect Time. It had a "qualified or conditional privilege," *Cresson* v. *Dispatch Printing Co.*, 291 Fed. 632 (D. C. Minn. 1923), to comment fairly upon, and criticize fairly, the Commission report. Under Illinois law, governing here, Time can be liable if it goes beyond that limit and "states as a fact that which is not true * * *." *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 64 N. E. 2d 751, 761 (1945), *Belt* v.

Tribune Co., 6 Ill. App. 2d 489, 128 N. E. 2d 638 (1955). "It is fundamental that fair comment and criticism cannot be predicated on an unfair or false statement of facts." *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, at 494, 128 N. E. 2d 638, at 640. The rule applies to writing about crime. *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 585, 64 N. E. 2d 751, 763 (1945).

The test of the fairness of the Time article is the meaning which readers of common and reasonable understanding would ascribe to the language used. *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, 493, 128 N. E. 2d 638, 640 (1955). And as Justice John C. Lewe said in *Dilling* v. *Illinois Publishing & Printing Co.*, 340 Ill. App. 303, 306, 91 N. E. 2d 635, 637 (1950), "* * * a person of ordinary intelligence should read a newspaper article * * * with ordinarily intelligent discrimination."

The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by the introduction, conditioned by the Georgia incident and its stark ending, and prepared to read how the Chicago police treated Monroe's family in the very early morning while "ostensibly" investigating a murder. Then the reader is told that *Justice* "says" Pape and others *did* what the Report merely said Monroe's complaint *alleged* Pape and others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated "Y", in the Georgia incident, was not punished.

We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go to far, *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 582, 64 N. E. 2d 751, 761, 763 (1945), quoting Judge O. W. Holmes, Jr. A jury could find that Time went beyond the

limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did*. The typical newspaper reader could take from the article the impression that Pape and the other officers were not really investigating a murder when they mistreated the Monroe family, that the noted educators in *Justice* found that the Monroes were mistreated by Pape and the other officers, and that they were not being punished but ought to be.

It is true that the Commission had the facts alleged in the *Monroe* complaint, from which it quoted, investigated sufficiently to justify their use for the Commission's purposes in the Report. But the Commission was careful to state, at the beginning of its Report: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."[8] The Time article, however, does not say that. The article says that the Commission Report "stands as a grave indictment, since its facts were carefully investigated." But the Report does not say that. The "carefully investigated" statement in Time adds weight to its quotation, substituting the words "says *Justice*" for the words of the Report, "* * * a complaint which alleged that."

Time argues that the "innocent construction" rule requires this court to read the article "innocently," citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N. E. 2d 105, 108 (1962). We are required by the rule in that case to give the Time article its "natural and obvious meaning." To read the article innocently, Time asks us to read the

8. 5 U. S. Comm. on Civil Rights Report 5 (1961).

article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things, assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done these things.

The complaint states a claim upon which relief can be granted. The District Court erred in ordering it dismissed.

This court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court, a verdict and judgment was recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied.

The judgment is REVERSED, and the cause REMANDED for further proceedings.

SCHNACKENBERG, *Circuit Judge*, dissenting:

The foregoing opinion's importance lies in its alarming invasion of the right of the press to publish its interpretation of the factual situation presented in an official report issued by a commission created by the Congress of the United States. 42 U. S. C. A. § 1975.

From the Commission's report entitled "Justice", it is clear that the Commission had a basis for the statements which it made in its report.[1] It referred, at page 105, to "a comprehensive review of available evidence", while, at page 5, it disclaimed making any conclusive determination as to whether the complainants or the police officers were correct in their statements, this being "a function of a court". But it expressly stated that "allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn

1. Said act required the filing of a report. See § 1975c(b).

testimony, affidavits from eyewitnesses, or by *staff*[2] field investigations". That case not having come to trial in court at that time, the Commission, for convenience, expressly quoted the charges of the Monroe complaint as set forth by Mr. Justice Frankfurter in his dissent, 365 U. S. 167, at 203-204.

Justice dealt with numerous other cases where police brutality charges had been made, discussed violence by others than police, considered state and local remedies and the status and rights of the American Indian.

At 112, Justice made recommendations to Congress as to the advisability of remedial legislation. The report was duly transmitted to Congress.

The report known as Justice was privileged and nonactionable in a libel suit. A published article which fairly comments upon a governmental report is likewise privileged and nonactionable, under Illinois law. The publication in the case at bar is a fair comment upon the issuance of a governmental report and its contents. Plaintiff cannot force publishers, under threat of libel, to conceal the fact that the Commission pointed to his alleged conduct as a basis for its conclusions and recommendations to Congress.

I would affirm.

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2. Italics supplied for emphasis. § 1975d (a) provided that there should be a full-time *staff* director for the Commission.

APPENDIX "C".

Second Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant.*

vs.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1965

Before DUFFY and SWYGERT, *Circuit Judges,* and GRUBB, *Senior District Judge.*

DUFFY, *Circuit Judge.* Plaintiff Pape brought this suit seeking damages for libel. Jurisdiction was based upon diversity of citizenship. The complaint alleged the defendant, Time, Incorporated, publisher of the national weekly news magazine "Time", had defamed plaintiff in its November 24, 1961 issue. The allegedly libelous story reported the issuance and summarized the contents of the United States Civil Rights Commission's 1961 annual report. This Report entitled "Justice" is in book form. Chapter 2 is devoted largely to a description of alleged police brutality to Negroes.

The Time article entitled "Civil Rights—Dawdling on

the Corner", was based largely on Chapter 2 of the Commission's Report entitled "Patterns of Police Brutality." Time reported an incident which it claimed had occurred in Chicago involving brutality by Pape and other police officers while arresting members of a Negro family named Monroe.

In the District Court, defendant moved to dismiss—in effect, urging the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion. On appeal, this Court reversed. *Pape* v. *Time, Incorporated,* 318 F. 2d 652. We stated that the subordinate, vital question was whether Time's story of the Commission's Report of the Pape incident was fair comment.

In our opinion, we pointed out that the question then before us was not what the Commission's Report had said about Pape, but rather, what Time's article had said about the Report. We then noted that Time's article told the reader that the Report stated that Pape and others had actually committed certain acts. In fact, the Report had merely said that these acts were allegations in Monroe's complaint.

We stated "Under Illinois law, governing here, Time can be liable if it goes beyond that limit [fair comment] and states as a fact that which is not true. . . ."

We then said "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission report."

We decided that the complaint stated a claim upon which

relief could be granted, and we reversed and remanded for further proceedings.

Subsequent to remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullican,* 376 U. S. 254. Therafter, defendant took Pape's pretrial deposition. Pape testified he had been in the Chicago police department since 1933 and was presently a captain of police. He admitted that he and police officers under his command had gone to the Monroe house on the evening in question. At that time, he was deputy chief of detectives for Chicago. He had been appointed to that position by the Commissioner of Police. His permanent rank at that time was lieutenant of police.

In *New York Times,* the Supreme Court stated (376 U. S. p. 283) "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable."

Footnote 23 referred to, stated in part—"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . ." It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official. . . ."

Plaintiff urges that the Supreme Court thus confined its holding in *New York Times* to an "elected" public official. Also, that plaintiff was not a "public official" within the meaning of that case because he had neither been elected to his office, nor appointed nor confirmed in his appointment by an elective body.

We do not read *New York Times* v. *Sullivan* as being

limited to an elected public official. The Supreme Court based its decision, at least in part, upon certain precedents involving appointed officials. In one of the cited cases, the libel plaintiff was a Deputy Superintendent of Police for the city of Detroit. *Lawrence* v. *Fox*, 357 Mich. 134, 97 N. W. 2d 719. In another of the cited cases, the plaintiff was the Chief of Police of Los Angeles—*Snively* v. *Record Publishing Company*, 185 Cal. 565, 198 P. 1.

Subsequent decisions to *New York Times* clearly indicate the courts do not understand the rule announced in that case to be confined to elected public officials. In *Henry* v. *Collins*, 380 U. S. 356 (1965), the Supreme Court applied the *New York Times* doctrine to the Chief of Police of Clarksdale, Mississippi. The Chief was an appointed officer.

In *Tucker* v. *Kilgore*, 388 S. W. 2d 112 (Ky. 1965), the Court applied the *New York Times* doctrine to an ordinary police patrolman in the city of Louisville, Kentucky. See also *State* v. *Browne*, 206 A. 2d 591 (N. J. 1965) and *Matassa* v. *Bel*, 164 So. 2d 332 (La. 1964).

We hold that on the date Pape arrested James Monroe, when Pape held the position of deputy chief of detectives and lieutenant of police, he was a public official as that designation was used in *New York Times* v. *Sullivan*.

We turn, therefore, to consider whether the existence of "actual malice" by Time, Incorporated presented a jury question. The Supreme Court in *New York Times* v. *Sullivan*, stated at 376 U. S. 279-280: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."

The record before us shows that Time, Incorporated was, at least, negligent in printing as established facts, matters and events which the Commission's Report stated were mere allegations in a complaint. But, negligence is not enough.

In *New York Times*, the newspaper admitted it had had evidence in its own files affirmatively showing the falseness of numerous statements in the publication . . . 376 U. S. at pages 287-288; also that the Times had accepted and published the advertisement without in any way checking its accuracy against outside sources or material in its files. 376 U. S. 287.

The Supreme Court further said—376 U. S. at pages 287-288—"We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

In *Garrison* v. *Louisiana*, 379 U. S. 64, the Supreme Court applied the *New York Times* rule to criminal libel, holding that actual malice must be proved to convict an individual for libeling a public officer. The Court there defined malice as "only those false statements made with the high degree of awareness of their probable falsity. . . ." 379 U. S. 74.

The burden of proving actual malice is upon Pape. He admitted in his pretrial deposition that he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate attempt to harm him. He argues, however, that this question is already settled by reason of our decision in *Pape* v. *Time, Incorporated* (1962), 318 F. 2d 652.

Our previous decision was made prior to *New York Times* v. *Sullivan*. There, the District Court had dismissed the complaint on the defendant's motion so that all the well-

pleaded facts stood admitted before us. We applied Illinois law.

We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.

As stated in our previous decision—". . . Time took the risk when it reworded parts of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers *did* what the Commission Report merely said the Monroe complaint *alleged they did*."

We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment.

The judgment of the District Court is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX "D".

Third Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

vs.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 15, 1969.

Before DUFFY, *Senior Circuit Judge,* KILEY and KERNER, *Circuit Judges.*

DUFFY, *Senior Circiut Judge.* This is a suit for libel brought by plaintiff, a Chicago police officer, against Time, Incorporated, the publisher of Time Magazine. The claim of plaintiff is based upon a story printed in Time Magazine under date of November 24, 1961. This appeal is from an order of the District Court granting, at the close of all of the evidence, a directed verdict in favor of defendant.

Pape became a policeman in March 1933. He was promoted to the position of Deputy Chief of Detectives in 1957. He held this position on October 27, 1958. He was promoted to Captain in 1959. During the period Pape was a sergeant of police, he participated in hundreds of ar-

rests. On November 24, 1961, plaintiff, while on leave of absence from his police position, was employed as Director of Security for the Chicago Thoroughbred Enterprises, Inc., which company operates several race tracks in the Chicago area.

"Justice", Volume 5 of the official 1961 Report of the United States Commission on Civil Rights, was issued on November 17, 1961. The Report stated: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."

Under the heading of "Search, seizure, and violence: Chicago, 1958," the Commission's Report stated that "... on the basis of a complaint which alleged that: . . ." It thereafter related an alleged occurrence on the part of detective Pape and twelve other police officers during which it claimed that Monroe and members of his family were abused and Monroe was arrested and questioned about a recently committed murder.

This is the third time this case has been before us. In *Pape* v. *Time, Incorporated*, 318 F. 2d 652, 655 (7 Cir., 1963) we reversed the judgment and remanded the case for further proceedings. In that opinion we stated: "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far, ... A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report."

After the remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Thereafter, this case came before us for a second time. Our opinion in that case appears in *Pape* v. *Time, Incorporated*, 354 F. 2d 558 (7 Cir., 1965) (second

opinion). We again reversed the judgment of the District Court and remanded. We held that Pape was a public official as that designation was used in *New York Times Co. v. Sullivan, supra.* There is no reason to now reverse that holding. We recognized the doctrine "[T]hat prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. * * *" *Pape* v. *Time, Incorporated, supra,* at page 560.

In the second opinion at 354 F. 2d 560, we quoted from our first opinion as follows: "It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow (sic) officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.*'" We again reversed the judgment of the District Court and remanded.

The Supreme Court has handed down several opinions explaining the language of the *New York Times Co.* v. *Sullivan, supra,* case. Among the cases which we have carefully considered is *Garrison* v. *Louisiana,* 379 U. S. 64, 74 (1964). The Court there held that recklessness requires a showing of a high degree of awareness of probable falsity. In *Henery* v. *Collins,* 380 U. S. 356, 357 (1965), the Court emphasized its interpretation of an "intent to inflict harm through falsehood." *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81, 84 (1967) and *St. Amant* v. *Thompson,* 390 U. S. 727, 731 (1968).

In our second opinion we stated at 354 F. 2d 560 "Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit." Since that time, the author of the Time article, one Edward F. Magnuson, has so testified. He admits that *when he wrote the article* he

knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon a complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word "complaint" and of the word "alleged." However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit.

We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written, the Pape-Monroe incident was reported in "Justice" as allegations in a complaint, not as proven fact. And the alleged injury to Pape was in Time's stating that the Commission reported that incident as true, instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an "intent to inflict harm through falsehood." *Garrison* v. *Louisiana*, 389 U. S. 64, 74 (1964); *Henry* v. *Collins*, 380 U. S. 356, 357 (1965).

We think pertinent the recent statement of the Court of Appeals for the Second Circuit in *Goldwater* v. *Ginzberg*, 414 F. 2d 324, 337 (2 Cir., 1969): "One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context."

We hold the District Court was again in error in granting defendant's motion for a directed verdict.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

KILEY, *Circuit Judge*, concurring.

I concur in Judge Duffy's opinion that this case should have gone to the jury.

It is my view that the testimony of Magnuson, referred to in Judge Duffy's opinion, was sufficient prima facie to prove that Time published the article in suit "with knowledge that it was false." The publication of the article with the words in the Commission report deliberately omitted could reasonably be found to be a publication of "a defamatory falsehood . . . with knowledge that it was false." This met the test of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital element of "actual malice." I agree that the case progeny of *New York Times Co.* v. *Sullivan* has not changed the Supreme Court's test.

The effect of doing to the Commission report what Time did to it was to give the report an additional reader value. The Time article does not contain the various qualifications in the Commission report which Time urges upon us now with respect to the context in which the Commission treated the Monroe-Pape incident. We must consider the Time article as it was published.

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In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1969

TIME, INC.,

Petitioner,

vs.

FRANK PAPE,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1969

No. 1309

TIME, INC.,

Petitioner.

vs.

FRANK PAPE,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The Petition correctly sets forth the citations of the various opinions below except that it fails to note that certiorari was denied the second opinion of the Seventh Circuit by the Supreme Court, in 384 U.S. 909. The third opinion of the Seventh Circuit, the review of which is now sought, is reported in *Pape* v. *Time, Inc.*, 419 F.2d 980.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

The question presented is whether, in a libel action, on a motion for directed verdict, there was any evidence upon which a jury could properly find the defendant, Time, Inc., in publishing its falsehood, guilty of malice; that is, knowledge of falsity or reckless disregard of whether its story was true or false.

Statement of the Case

This is an action for libel brought by the plaintiff, Frank Pape, a Chicago police officer, against the defendant, Time, Inc., growing out of a story appearing in the magazine of the defendant dated November 24, 1961.

On November 24, 1961, Frank Pape was employed as Director of Security for the Chicago Thoroughbred Enterprises, Inc., which operates Arlington Park, Washington Park and Balmoral Jockey Club, in and about the City of Chicago, State of Illinois. On said date he was on leave of absence from his position as Captain of Police with the Chicago Police Department. Capt. Pape had become a police officer in March 1933, and continued in that employment until April 15, 1961, when he was employed on a full time basis by the above named race tracks. Plaintiff was a patrolman from 1933 to 1942. In 1942 he was promoted to sergeant and in 1952 he was promoted to lieutenant. He attained the rank of captain in 1959. During the period Frank Pape was a sergeant he participated in hundreds of arrests (App. 213). Plaintiff was appointed to the position of Deputy Chief of

Detectives in 1957, which position he held on October 17, 1958.

On November 17, 1961 the Annual Report of the United States Commission on Civil Rights was issued and published (App. 266). The chapter of the Commission's Report relevant hereto begins with the statement:

> "In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality."

The Report went on to caution:

> "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."

The Commission's Report went on to recite eleven incidents. Insofar as ten of these incidents were concerned the Commission identified the persons involved only by initials. The remaining incident reported by the Commission concerned the plaintiff, Frank Pape, and appeared on pages 20 and 21 of its Report, as follows:

> "Search, Seizure and Violence: Chicago, 1958—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although its decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that:
>
> > '. . . On October 29, 1958, at 5:45 A.M., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the

living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him."

On November 24, 1961 Time, Inc. published its magazine with nation-wide circulation of 2,700,000 and circulation in and about the City of Chicago of 53,000, and in the State of Illinois of 155,000 (App. 43 and 51). It contained the following article:

"Dawdling on the Corner

"The new paperback book has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission.

"The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Georgia, who arrested Negro James Brazier for speeding in November 1957. It quotes James Brazier: 'when I first entered the door of the jail, "Y" hit me on the back of the head and knocked me down and said, 'you smart son-of-a-bitch, I been wanting to get my hands on you for a long time.' I said, 'why you want me for?' 'Y' said, "you is a nigger who is buying new cars and we can't hardly live. I'll get you yet.'" When Brazier was arrested again five months later by the same officer, Brazier's wife related: '"Y" then said, 'I told you I would get you.' James said, 'what do you want to hurt me for? I ain't done nothing. I got a heap of little children.' 'Y' said, "I don't give a goddam how many children you got, you're going away from here." 'Y' pulled out his pistol and struck it against James' stomach.'

"Beaten to Death." Continues the report: "Brazier's ten-year old son pleaded with the officers to stop beating his father and was knocked to the ground by 'Y'; the victim was thrown onto the floor of the police car with his legs dangling outside. 'Y' kicked him twice in the groin, slammed the car doors on his legs, threw a hat full of sand into his bloody face, and drove off." Brazier died five days later and 'Y' was never punished.

"Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 A. M. by thirteen police officers, ostensibly investigating a murder. The police, says *Justice*, "broke through two doors, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and 'stand naked in the center of the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' Another officer pushed Mrs. Monroe.

> Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers." The officers were not punished; although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

Thereafter, the plaintiff, Frank Pape, filed this action against Time, Inc., founded on libel, alleging that the aforesaid Time article was false in that it reported the Commission *said* Pape had done the aforesaid things, when in fact, the Commission was only reporting allegations of complaint. Time, Inc. filed a motion to strike the complaint, which motion was granted by the District Court. On April 25, 1963, in the case of *Frank Pape* v. *Time, Inc.* (1963, C.A. 7th, Ill.), 318 F. 2d, 652, the Circuit Court of Appeals rendered its decision reversing the District Court. The Circuit Court of Appeals there held that "Time took the risk when it re-worded parts of the Commission's Report that it might go too far", and further held that a jury could find that Time went beyond the limits of fairness and in so doing was not protected by its privilege of fair comment. The Circuit Court of Appeals further found in that decision that "a jury could read the Time article as stating that the report said Pape and his fellow officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.* (Emphasis supplied)

Thereafter, this Court, in the case of *New York Times* v. *Sullivan*, 376 U.S. 254, rendered its decision holding that in a libel action by a public official there must be a showing that the false statement was made with malice; that is, knowledge of its falsity or reckless disregard of whether it is true or false.

On remandment of this case an answer was filed by Time, Inc. The deposition of Pape was taken and the District Court granted a motion for summary judgment, relying on the case of *New York Times* v. *Sullivan (supra)*. A second time the case was appealed to the Circuit Court of Appeals. On the second appeal in *Frank Pape* v. *Time, Inc.* (1965 C.A. 7th Illinois), 354 F.2d 558, the Circuit Court of Appeals held the defendant, Pape, a public official within the meaning of the *New York Times* v. *Sullivan (supra)* and considered whether or not the record before it on motion for summary judgment revealed facts sufficient to show that the statement made by Time, Inc. was made with "actual malice"—that is, with knowledge that it was false or reckless disregard for whether it was false or not. In this regard the Court said:

> "We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.
>
> "As stated in our previous decision '. . . Time took the risk when it re-worded parts of the Commission's Report that it might go too far. . . . .' We noted Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F.2d, at page 655), 'it is our opinion that a jury could read the Time article as stating that the Report *said* Pape and his follow (sic) officers did what the Commission Report merely said the Monroe complaint alleged they did.'

> "We hold that a sufficient showing has been made so that a jury could find Time, Inc. acted with reckless disregard as to whether or not re-worded statements hereinbefore described were true or false. Therefore, it was error for the District Court to grant defendant's motion for summary judgment."

Certiorari was denied this decision by the Supreme Court in 384 U.S. 909.

On the second remandment of this cause the parties entered into a stipulation of fact and a pre-trial order was entered and the matter proceeded to trial. Eight eye-witnesses were produced, including plaintiff, Pape, each of whom testified as to the incident set forth in the Commission's Report and the Time article. Generally, each of these witnesses denied those acts set forth as facts in the Time article and in the complaint reported by the Commission. Pape's testimony was substantially the same as the deposition previously filed in support of the motion for summary judgment which had been reviewed by the Circuit Court of Appeals. In addition, on the trial of the cause there was presented the testimony of Edward F. Magnuson, the author of the Time article. Magnuson, a former police reporter for the Minneapolis Tribune, testified that he had three documents to which he referred when he wrote the Time article. These documents consisted of the Commission's Report, heretofore set forth (App. 374), a news release from the Commission, Exhibit G, which in no way mentioned the plaintiff, Pape (App. 220), and a New York Times story, Exhibit H, which in no way mentioned plaintiff Pape (App. 220). Magnuson also testified that in addition to the aforesaid, the only other investigation he made was a telegram to Chicago to determine whether or not Pape had been punished

(App. 221). As far as writing the article was concerned, Magnuson testified as follows (App. 219-220):

> Q. Would you describe, sir, what deletions you made between the matter you read in the government publication and the matter which you read in the Time article?
>
> A. Well, we have deleted only in the quotable parts here, the section of that paragraph which is within quotes. The only changes in that section have been to change the word "that" in the *Justice* document to "the" in order to break up this long, long sentence. We have changed the semicolon to periods, again in the interests of clarity. Then we did not continue the whole quote, which goes on to what happened after Monroe was arrested and brought to the police station.
>
> Q. You also, sir, omitted that part of the article that is in *Justice* which reads, 'On the basis of a complaint which alleged that . . .'
>
> A. That's right.

Magnuson further testified that he knew he was reporting as a fact what the Commission only reported as allegations in a complaint. Magnuson testified as follows (App. 253-255):

> "Q. . . . I will read it for you. I am reading after the words 'Searches, seizures, violence, Chicago' "The Supreme Court of the United States decided the case of Monroe vs. Pape on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the Plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that", you did read that?
>
> A. I certainly did, right.
>
> Q. You understood the word 'complaint'.
>
> A. That's right.

Q. You understand the word 'allege'?

A. That is right.

Q. Therefore, while you did not find the word 'allege' in the running head, 'Searches, seizure and violence, Chicago, 1958', you did find it in the body, is that right?

A. I did, sir, right.

Q. You found the word 'complaint'?

A. That's right . . . .

Q. Well, I will read it again, sir, it says '. . . on the basis of a complaint which alleged' . . . Mr. Reuben asked you a moment ago to tell us what you thought, so suppose you now tell me what you think. What did you think when you read, '. . . on the basis of a complaint which alleged . . .? Tell us what that means to you.

A. That means to me the Commission in this case is reporting this incident in terms of a claim being made in a Court by the Monroes, but you can't stop there . . . .

Q. There is more here than just an allegation or a complaint.

A. In the context of this report there is more than just an allegation involved here, that is right.

Q. You did not understand this as simply the complaint of James Monroe as filed in a court suit.

A. I knew they were citing the complaint of James Monroe.

Q. However, you understood that there was more to it than just that.

A. That is right."

Mr. Magnuson admitted that by the Time article he was not trying to say the Commission was reporting allegations of a complaint. Magnuson further testified that changes which he made in his article from the Commission Report did not make it clear to the reader that these were allegations of a complaint (App. 261.) He

further testified that by his article concerning Pape he was talking about findings of the Commission (App. 261).

Testimony was also presented on the trial of this cause by one Karen Booth, editorial researcher for Time Magazine, who was the researcher on the Time article which is the subject matter of this action. She stated that as a part of this job she read the Commission Report and checked the Time story against the Commission Report (App. 267). She further testified that she called for the "morgue" file of Time, Inc. concerning the Monroe-Pape incident (App. 267). In checking the article against the Commission Report she found that although Magnuson's quotation from the Report was accurate, it was not complete (App. 270). Reference to the complaint and allegations had been left out. She further testified she did not believe it was her function as a researcher to call this fact to the attention of the writer (App. 270). She believed it was the prerogative of the writer to choose what portion of a particular quotation he desired to use (App. 271). She examined the "morgue" of Time but the only attempt to call this "morgue" to the author's attention was a conversation wherein Mrs. Booth told the author that there was quite a bit of material on Capt. Pape and the Monroe case in the library and that other newspapers had published reports of that incident (App. 251).

At the close of the plaintiff's case defendant moved for a directed verdict, which motion was denied. At the close of all the evidence the defendant again moved for a directed verdict, which motion was allowed.

Plaintiff thereupon appealed for the third time to the Circuit Court of Appeals. On such appeal in *Pape* v. *Time, Inc.*, 419 F.2d 980, the Circuit Court of Appeals

once again reversed the judgment of the District Court and remanded the cause.

In this opinion, after reviewing the various decisions of the United States Supreme Court, on what constitutes malice, the Circuit Court of Appeals said:

> "In our second opinion we stated, at 354 F.2d, 560, 'Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit.' Since that time the author of the Time article, one Edward F. Magnuson, has so testified. He admits that when he wrote the article he knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon a complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word 'complaint' and of the word 'alleged.' However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and the action of Pape and the other police officers was based on allegation in a complaint in a pending suit.
>
> "We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written the Pape-Monroe incident was reported in *Justice* as allegations in a complaint, not as proven fact, and the alleged injury to Pape was in Time's stating that the Commission reported the incident as true instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an 'intent to inflict harm through falsehood.' (Citations)

> "We think pertinent the recent statements of the Court of Appeals for the Second Circuit in *Goldwater* v. *Ginsberg,* 414 F. 2d 32, 327 (2nd Cir. 1969): 'One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context.'"

In a concurring opinion Judge Kiley of the Circuit Court of Appeals stated:

> "It is my view that the testimony of Magnuson referred to in Judge Duffy's opinion was sufficient *prima facie* to prove that Time published the article in suit with knowledge that it was false.' The publication of the article with the words in the Commission Report deliberately omitted could reasonably be found to be a publication of 'a defamatory falsehood . . . with knowledge that it was false.' This met the test of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, (1964), under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital element of 'malice' . . . ."

This is a petition to the United States Supreme Court to review this third decision of the Circuit Court of Appeals for the Seventh Circuit.

ARGUMENT

REASONS FOR DENYING THE WRIT

Under the Constitution of the United States there is a right of privacy. There is freedom of speech and press. There is a right to trial by jury in libel actions. The Court of Appeals for the Seventh Circuit, in the instant case, following *New York Times* v. *Sullivan*, and its progeny, maintained the delicate balance between free expression and the right of a man to the protection of his own reputation from unjust invasion and wrongful hurt. The Court of Appeals for the Seventh Circuit is not in conflict with any decisions of this Court or other Courts in defining and applying the New York Times actual malice test.

The Court below could not subscribe to Time, Inc.'s contention that a showing of malice can be defeated only by its protestation of good faith. In so doing it followed this Court's pronouncement in *St. Amant* v. *Thompson*, 390 U.S. 727, at page 732, where it is said:

> "The defendant in a defamation action by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or based wholly on a non-verified annonymous telephone call."

Protestations of good faith are meaningless where, as Time, Inc. admitted here, it knowingly and intentionally

transformed a report of a high governmental official of allegations in a complaint into findings of fact of such Commission. Therein lies the lie, and Time, Inc. knew it was lying. *New York Times* v. *Sullivan* defines "actual malice" as with knowledge that a statement was false or with reckless disregard of whether it was false or not.

Under the facts of this case, for the Circuit Court of Appeals to have held otherwise would have been a denial of this Court's holding that malice may be proved by a showing of knowing falsity, and would mean that there was no protection to the individual of his reputation from unjust invasion and wrongful hurt.

In its petition before this Court Time, Inc. laments the chilling effect that jury verdicts might have on freedom of press and speach, and would translate such concern into a denial of the right to a jury trial. By its petition to this Court Time, Inc. not only fails to recognize that the decision of the Court of Appeals below was in accord with the pronouncements of this Court and other Circuits, but also fails to recognize the present procedure position of this case. The District Court decided this matter on a motion for directed verdict. Under such circumstances the directed verdict should have been denied if there was any evidence from which a fair-minded jury could find for the non-moving party. The abandonment by the District Court of this principle was tantamount to the denial of the right to trial by jury.

The Circuit Court of Appeals reversed and remanded. Therefore this matter comes to this Court without finality. Ordinarily this Court will not grant certiorari to review a non-final judgment, such as one remanding a case to the District Court for a new trial.

This case involves the first amendment. It may be the most important provision of the United States Constitution. Freedom of press is important. The right of privacy is important. This does not mean to say that every case falling within these categories is of such importance as to clog this Court's busy schedule. It involves the attempt of a simple police officer of the Chicago Police Department to protect an unsullied reputation after many years of service. It involves an incident nine years old, not a part of current civil rights activities in the City of Chicago. Certainly, this case, although concerned with somewhat similar issues, is not as important as the case of *Goldwater* v. *Ginsberg*, 414 F. 2d, 324, wherein this Court denied certiorari in 396 U.S. 1049.

The principles of law and the rules of this Court favor the denial of certiorari by this Court and require that the Seventh Circuit's holding stand.

THE SEVENTH CIRCUIT'S HOLDING IS IN HARMONY WITH THE DECISIONS OF THIS COURT AND ALL OTHER CIRCUITS.

A. HARMONY WITH THIS COURT'S DECISIONS.

There can be no argument that the Court below subscribed to and recognize the principles set down by this Court in *New York Times* v. *Sullivan*, 376 U.S. 254. The Court below stated:

> ". . . we recognize the doctrine 'that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . . .'"

Time, Inc. only argues here what constitutes malice sufficient to permit a case to go to the jury.

New York Times v. *Sullivan* was an action for libel brought by the Commissioner of Public Affairs of the City of Montgomery, Alabama, against the New York Times because of a paid advertisement appearing in its newspaper over the signature of sixty-four persons widely known for their activities in public affairs, which advertisement stated:

> "In Montgomery, Alabama, after students sang 'My Country 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school and truck loads of police, armed with shot guns and tear gas, ringed the Alabama State College campus. When the entire student body protested to State College authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. . . .
>
> "Again and again the Southern violators have answered Dr. King's peaceful protest with intimidation and violence. They have bombed his home, almost killing his wife and child; they have arrested him seven times for speeding, loitering and similar offenses, and now they have charged him with perjury, a felony under which they could imprison him for ten years . . . ."

The plaintiff in the *New York Times* case equated the various charges in the advertisement aforesaid to himself because he was the city official in charge of police.

After enunciating the rule that malice is required in an action for libel by a public official, this Court, in the *New York Times* case, examined the record to determine whether malice existed. This Court found malice lacking because:

> 1. This Court found the matters set forth in the advertisement substantially true and any admission

by New York Times officers of minor discrepancies were after the fact and had no relevancy to the time of publication (p. 286).

2. The mere presence of contrary stories in the files of the Times did not establish that the Times knew the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication of the advertisement (page 287).

3. The New York Times was excused from an independent investigation since the Times had a right to rely upon the knowledge of the good reputation of the many persons listed as sponsors of the advertisement.

4. There was no reference to the plaintiff in the advertisement, either by name or official position, and many of the allegations by their terms did not even concern the police (page 288).

5. The advertisement constituted an attack on government and not on plaintiff (page 290).

The magazine article in the instant case was not an advertisement sponsored by persons well known in public affairs. It was not a general attack on government. It named the plaintiff, specifically charging him with heinous crimes in the course of his duties. Plaintiff was the only one in such article mentioned by name; others accused of wrongdoing were referred to at most by initials. The article said:

"The new paperback has 307 pages and the simple title, *Justice*. It is the last of five volumes in the

second Report of the Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text of police brutality in both the South and the North and it stands as a grave indictment, since its facts were carefully investigated by field agents, and it was signed by all six of the noted educators who comprise the Commission . . . .

". . . The police, says *Justice*, "broke through two doors, woke the Monroe couple with flashlights, and forced them, at gunpoint, to leave their bed and stand naked in the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy' . . . ."

This article is a far cry from a general attack on the police of the City of Chicago or an attack like that in the *New York Times* case on the police of Birmingham, Alabama.

In this article Time, Inc. said that a high-ranking Commission found plaintiff guilty of assault and battery, obscenities and police brutality. Time's employee who wrote this story admitted that he knew at the time of the writing the Commission was only setting forth allegations of a complaint. This knowledge existed at the time Time's story was written and was not, as in the *New York Times* case, an admission of minor discrepancies a substantial time after publication.

The only matters which the author had before him in writing the story was the Commission Report and two other publications which in no way mentioned the plaintiff. He knowingly chose to report as findings of fact what the Commission reported as allegations. He did so in spite of the fact that the Commission's Report is

couched in the most cautious terms. All instances in the Commission's Report, except the Pape incident, employed initials. The Commission specifically stated "in no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements." The Commission introduced its chapter as follows:

> "In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality."

Time can take no pride in its so-called methodology of searching its morgue. Here, as in *New York Times*, the contents of the morgue were never brought to the author's attention. It should also be pointed out that anything in the morgue concerning the Commission Report did not mention Pape, and therefore could not justify the author in reporting that the Commission found Pape guilty of crimes when said Commission only reported allegations of a complaint.

New York Times v. *Sullivan* found malice wanting, among other reasons, because the mere presence of contrary stories in its files "does not, of course, establish that the Times knew the advertising was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication of the advertisement." *A fortiori*, the *New York Times* case holds that if a contrary statement is brought home to the person in the publishing organization having responsibility for the publication and he chooses to ignore it, malice exists. Here, Time's author knew that he was dealing with allegations but chose to report them as findings of fact. There-

fore, the Court below in its opinion was only carrying out the principles of this Court in *New York Times* v. *Sullivan.*

Besides the author's publication of a known falsity, the record in this case indicates such a total want of verification when information was easily available, such unreasonableness of the libel statement, with its dire consequences to the plaintiff, as to constitute reckless disregard of whether it was false or not. Under such circumstances the decision of the Circuit Court of Appeals is in accord with this Court's holding in *St. Amant* v. *Thompson,* 390 U.S. 727 (1968) and *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 130 (1967). In the *Butts* case the United States Supreme Court expanded the *New York Times* rule to "public figures" but upheld the jury verdict on the ground that malice had been shown. The Court, at page 1991 equated malice to "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. On pages 1992 and 1993 the Court states:

> "The evidence showed that the Butts story was in no sense hot news and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were nevertheless ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael, who was supposed to have been with Burnett when the phone call was overheard, was not interviewed. No attempt was made to screen the films of the game

to see if Burnett's information was accurate and no attempt was made, to find out whether Alabama had adjusted its plans after the alleged divulgence of the information.

"The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from the game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action based on a different article brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of 'sophisticated muckraking' and the pressure to produce successful expose' might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Finally, at page 2994, the Court states:

"Publishers, like Curtis, engage in a wide variety of activities which may lead to tort suits where punitive damages are a possibility. To exempt a publisher because of the nature of his calling from an imposition generally exacted from other members of the community would be to extend a protection not required by the constitutional guarantee. . . ."

". . . Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision

acknowledges, we think it entirely proper for the state to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse."

The case of *St. Amant* v. *Thompson* involved a defendant who was a candidate for public office. In the course of a television speech the defendant read a series of questions which he had put to a member of the Teamsters Union and said member's answers to those questions. The exchange concerned the alleged nefarious activities of the President of the Union. The plaintiff was an East Baton Rouge Parish deputy sheriff and in the course of the questions and answers the deefndant read an answer of the Union member that money had passed between the Union President and the plaintiff. This Court overturned a jury verdict for the plaintiff, holding that there was insufficient showing of reckless disregard. In so doing the Court was persuaded by the fact that the defendant had verified other aspects of this Union member's information and had affidavits from others, and that the Union member had sworn in writing to his answers which were read, and the Union member in making such answers was placing himself in personal danger. Under such circumstances the Court felt the defendant had a right to rely upon his limited investigation.

In the instant case Time Magazine made no independent investigation, although it, like Curtis Publishing Company in the *Butts* case, was not dealing with hot news. Time, Inc. cannot contend that it relied upon the investigation of the Commission staff, since such investigation only produced the fact that a complaint had been filed, with certain allegations. No one at Time, Inc. made any attempt to contact anyone who was involved in the Monroe in-

cident. Time, Inc., unlike the defendants in the *Butts* and *St. Amant* cases, had no affidavits from any sources. It is true that a Time researcher did go to the Time morgue and found certain newspaper clippings. The researcher, however, in no way called the various stories constituting the Time morgue file to the attention of the writer. Therefore, the contents of such morgue stories in no way influenced the contents of the article. In any case, such stories constituted no more than hearsay newspaper and magazine clippings, the authenticity of which were not checked. Similar research was condemned in *Spahn* v. *Julian Messner, Inc.*, (1967) 233 N.E. 2d 840, at pages 843.

The finding of the Court below which held that a sufficient showing of malice had been made to permit the case to go to the jury is also in accord with this Court's holdings in the cases of *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), and *Henry* v. *Collins*, 380 U.S. 356 (1965), and the Court below carefully considered each of these decisions.

In addition, the decision of the Court below is in accord with this Court's decision in the case of *Gunning* v. *Cooley*, 281 U.S. 90, wherein, at page 94, the rules governing courts on motions for directed verdict are set down as follows:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' (Citations)

"Issues that depend on credibility of witnesses, and the effect or weight of the evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such fact there should be drawn in favor of the latter all the inferences that fairly are deducible from them (Citations). Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. (Citations)."

We respectfully submit that certiorari should be denied because the Circuit Court of Appeals for the Seventh Circuit followed and properly applied the principles enunciated by this Court in *New York Times* v. *Sullivan* and its progeny.

B. HARMONY WITH OTHER CIRCUITS.

The Seventh Circuit's decision is in accord with the holdings of Courts of other Circuits, of District Courts and the Supreme Courts of the various states.

Recently the Circuit Court of Appeals for the Second Circuit rendered its decision in the case of *Goldwater* v. *Ginsberg,* 414 F.2d 324 (1969). This case was concerned with an article in "Fact" Magazine, which article alleged that Senator Barry Goldwater was psychologically unfit to be President. There, like here, the defendant sought to escape malice by contending that he relied on other sources in setting forth his story. The Court upheld a denial of motion for summary judgment and of a motion for directed verdict and jury verdict. At pages 337 the Court said:

"Citation of sources for most of the statements about Senator Goldwater in Part I of the 'Goldwater issue' and the accurate reprinting in Part II of most of the original responses of psychiatrists to the Fact questionaire, does not, as appellants appear to claim, insulate appellants from responsibility for any of the false statements they made. Reliance upon newspaper articles, books and campaign literature and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual malice when he caused the full material to be published. Repetition of another's words does not release one of the responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his report. (Citations) Furthermore, in our case, Ginsberg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the report of another if the latter's statements or observations are altered or taken out of context. Also, if Ginsberg's 'melding' and 'distillation' of letters results in misplaced emphasis or exaggeration, or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his misstatements.

"Viewing the submitted material and the inferences which might be drawn from them 'in the light most favorable to the party opposing the motion' (Citations), the district court properly concluded that a trier of fact should have the opportunity to decide whether appellants were liable to appellee"

In the instant case defendant, Time, Inc., like the defendant Ginsberg, argues its good faith and seeks to avoid liability by claiming that it was relying on the Commis-

sion's Report. But Time and Ginsberg altered the reports and exaggerated and distorted what was said. Under such circumstances the Court below, as well as the Second Circuit, in *Goldwater* v. *Ginsberg,* (supra), held that the defendant cannot reasonably maintain that the misstatements contained in the new product thereby created are not the misstatements of the defendant.

So also, in the case of *Varnish* v. *Best Medium Publishing Company,* 405 F.2d 608 (1968), the Court was confronted with protestations of good faith by the author. This involved the reporting of a murder and the suicide of the plaintiff's wife. Plaintiff attacks the article because it employed a "happy wife and mother" theme, which was false. There was a suicide note available to the author when the story was written which said (p. 611):

> "Just a note and explanation to let you know that I am going to put the three children and myself to sleep forever. I see no future for the children or myself. Mitch (plaintiff) is impossible and this is the only way to get away from him. I've had a miserable life since the time I met him. Tell Uncle Chris and Uncle Butch I'm sorry about the money they each loaned me in 1961 . . . I owe so much I'll never have to bother anyone anymore."

In his article the author said:

> ". . . Police found a note left by Mrs. Varnish for her mother, which said: 'Just a note in explanation to let you know know I am going to put the three children and myself to sleep forever. I can't go on.' It was an explanation that explained nothing, least of all to the shocked Varnish."

The Court on review required malice and upheld the jury verdict. At page 612 the Court said:

> "Evidence of recklessness consists largely of the author's testimony on cross-examination that he had no basis except his own 'presumption', for labeling Mrs. Varnish a happy wife and mother. Both the suicide note and the police report which the author had in his possession indicated that the Varnishes did not have a happy home life. Likewise, the manner in which the suicide note was used by the author could be taken as evidence of intent or recklessness. Therefore, the jury was entitled to find that the article was published with the knowledge that it was false or in reckless disregard of the truth."

Certainly, the fact that a story was based on a written report from which information was inaccurately reported, strongly suggests the existence of actual knowledge. If a publisher alters or changes true facts so that the article as published becomes a fictionalized version, the least that can be said is that such action constitutes knowing or reckless falsity. Alteration or change denotes a positive act, not a negligent or inadvertent happening. Time was reporting what the Commission said. It knew that the Commission's report set forth allegations in a complaint. It intentionally and knowingly altered and changed this report of allegations into findings of fact, so that Time's article as published was a fictionalized version, a creation of its own. This was a positive act, not a negligent or inadvertent happening.

Throughout this appeal Time professes its good faith by stating that the author and the researcher believed that what they wrote was true. It is not clear, however, just what their protestations of true belief applied to. They admit that their story did not truly portray he Commission's Report, since the Commission reported only allegations. If they believed that they were truly reporting the Monroe incident, they entered upon it with absolutely no investigation of any kind to justify their accusations.

Nor is it true, as Time would have this Court believe, that the decision of the Seventh Circuit below is in conflict with the case of *New York Times Company* v. *Connor*, 365 F.2d 567 (Fifth Circuit 1966). In finding malice wanting the Court in the *Connor* case particularly excluded a situation such as is presented here. At page 577 the Court said:

> ". . . Although one might disagree with the conclusions, he (author) drew from his information or his emphasis on certain facts rather than others, there is no evidence that he misquoted his sources or gave the information acquired from them a different slant than intended as is so often done."

A case particularly similar to the instant case is the recent District Court decision in *Ragano* v. *Time, Inc.*, 302 F.Supp. 1005 (1969). In that case Time referred to an attorney as a member of the Cosa Nostra, knowing such individual was an attorney. The Court very succinctly stated the distinction which Time fails to make in the instant case. At page 1010 the Court said:

> ". . . The present case differs, however, because Time had actual knowledge of the fact that the plaintiff was an attorney but decided to disregard or omit this fact. The first amendment does not require that the plaintiff show knowledge of falsity and then, as Time contends, bad faith in the publisher's choice of disregarding the truth. When the plaintiff presents evidence to show that the publisher chose to substitute his opinion for facts actually known by him in an article that is capable of a defamatory meaning, he has come forward with sufficient evidence to show reckless disregard."

We submit the Seventh Circuit's decision is also in accord with *Hogan* v. *New York Times*, 313 F.2d 354 (1963); *Ashton* v. *Commonwealth*, 405 S.W.2d 562 (Supreme Court

of Kentucky 1965); *Gilligan* v. *King*, 264 N.Y.S.2d, 309, 48 Misc. 2d 212 (1965); *Tucker* v. *Kilgore*, 388 S.W.2d 112 (Supreme Court of Kentucky 1965); *Mahnke* v. *Northwest Publications, Inc.*, 280 Minn. 328; 160 N.W.2d 1 (Supreme Court of Minn. 1968).

THE DECISION BELOW LACKS FINALITY

By its decision the Circuit Court of Appeals for the Seventh Circuit reversed this cause and remanded it for a new trial. Therefore, there is a lack of finality in the decision of the Circuit Court of Appeals.

In the text book "*Supreme Court Practice*, Stern-Gressman, Third Edition, 1962, "Section 4-19, at page 148, it is said:

> "The Supreme Court will not usually grant certiorari to review a non-final judgment such as one remanding the case to the District Court for a new trial or one sanctioning the issuance or denial of preliminary injunction in the absence of some exceptional reason."

This Court enunciated the aforesaid principle in the case of *Hamilton Shoe Co.* v. *Wolf*, 240 U.S. 251, at page 258, where it said:

> ". . . Appeals for certiorari under Section 240, Jud. Code, derived from Section 6 of the Evarts Act of March 3, 1891, 26 Stat., 826, 828, Ch. 517. As has been many times declared, this is a jurisdiction to be exercised sparingly and only in cases of peculiar gravity and general importance or in order to secure uniformity of decisions (Citations), and except in extraordinary cases the writ is not issued until final decree (Citations). The decree that was sought to be reviewed by certiorari at complainant's insistence was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application . . . ."

The reason for this rule is to discourage piece-meal disposition of appeals. It is also an attempt to avoid the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings. To be effective, judicial administration by this Court must not be clogged. Appeal to this Court is not a matter of right and this Court certainly, except in rare instances, should not be called upon to pass on litigation which is not final.

This court always after remandment and new trial has the opportunity to consider litigation. It should also be pointed out that this case is before the Court on a motion for directed verdict, which motion does not permit the weighing of evidence but under the usual rules only permits a determination of whether there is any evidence from which a fair-minded jury might find for the non-moving party.

Time would have this Court abandon its long-honored principle of requiring certiorari only in instances on final judgments because of the so-called chilling effect of jury verdicts. So also, Time called upon the District Court to abandon the time-honored principle of viewing the evidence, on a motion for directed verdict, in the light most favorable to the plaintiff, because of its so-called chilling effect.

Nothing in *New York Times* v. *Sullivan*, or any cases thereafter requires the abandonment of trial by jury in libel actions. It is admitted that in all libel actions a plaintiff must show malice. It is admitted that on the trial of the cause the Court must properly instruct the jury as to what constitutes malice. It is denied, however, that juries in Chicago or anywhere else in the United States are at all deficient as a trier of fact. To so contend is a plea in

the special instance of libel for the abandonment of the jury system.

CONCLUSION

For the reasons set forth above we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 6, 1970

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No. ~~1200~~ 109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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No. 1309.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, granting the Motion of Petitioner, Time, Inc., for a Directed Verdict is reported in *Pape* v. *Time, Inc.*, 294 F. Supp. 1087 (1969), and is reproduced as Appendix "A", *infra.*

The first opinion of the Seventh Circuit is reported in *Pape* v. *Time, Inc.*, 318 F. 2d 652 (1963), and is reproduced as Appendix "B", *infra.* The second opinion of the Seventh Circuit is reported in *Pape* v. *Time, Inc.*, 354 F. 2d 558 (1965), and is reproduced as Appendix "C", *infra.* The

third opinion of the Seventh Circuit is reported in *Pape v. Time, Inc.*, 419 F. 2d 980 (1969), and is reproduced as Appendix "D", *infra*.

JURISDICTION.

The decision of the Seventh Circuit was rendered on December 15, 1969. The petition for certiorari was filed on March 12, 1970 and was granted on April 27, 1970. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

The District Court granted a directed verdict for the defendant publisher at the close of all the evidence on the ground that the plaintiff, a public official under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), had failed to sustain his First Amendment burden of proving with convincing clarity that an allegedly libelous news article was published with actual malice, *i.e.*, knowledge of falsity or serious doubts as to truth.

The Seventh Circuit reversed, holding that the editorial decision to omit the word "alleged" in describing charges of misconduct against the plaintiff in an official Report of the U. S. Commission on Civil Rights was alone sufficient to permit a jury finding of actual malice.

The question presented is whether the Seventh Circuit erroneously construed and applied the First Amendment test of actual malice formulated in *New York Times* and its progeny by considering only one isolated fact in the entire editorial process of writing and researching the article and by substituting the Court's editorial judgment and discretion for that of the publisher.

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution, Amendment I, Amendment XIV, § 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amend. I.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, § 1.

STATEMENT OF THE CASE.

(a) Introduction—History of the Suit.

This suit for libel was instituted against petitioner Time, Inc. by Captain Frank Pape of the Chicago Police Department in 1961. The article in question appeared in the issue of *Time* magazine published on November 24, 1961 (A. 332-33). Time, Inc. originally moved to dismiss Pape's suit on the grounds that the publication was a fair report of an official governmental document and was fair comment thereon. The District Court granted the motion and dismissed the cause. The Seventh Circuit reversed and remanded (with one Judge dissenting); the Seventh Circuit ruled that omission of the word "alleged" in describing charges of official misconduct made against Pape in a civil

rights suit discussed in the 1961 Annual Report of the U. S. Commission on Civil Rights could be found by a jury to exceed common law bounds of fair report. *Pape* v. *Time, Inc.*, 318 F. 2d 652, *cert. denied*, 375 U. S. 902 (1963). The opinion is reproduced as Appendix "B", *infra*.

After remand, this Court decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Time, Inc. thereafter deposed Captain Pape and moved for summary judgment. The motion contended that Pape was a *New York Times* public official and could not sustain his First Amendment burden of proving actual malice. The District Court granted the motion, but on appeal the Seventh Circuit again reversed. The Court held that although Captain Pape was a public official under *New York Times*, on the record then before the court (*i.e.*, Pape's deposition) the failure of Time, Inc. to use the word "alleged" in reporting the Civil Rights Commission's discussion of the action against Pape required a trial. *Pape* v. *Time, Inc.*, 354 F. 2d 558, *cert. denied*, 384 U. S. 909 (1966). The opinion is reproduced as Appendix "C", *infra*.

The case was remanded to the District Court and a full jury trial ensued. At the close of all the evidence, the District Court granted a directed verdict in favor of Time, Inc.; the Court ruled that Captain Pape had failed to sustain his First Amendment burden of proving actual malice as required by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) and its progeny (Appendix "A", *infra*). On appeal, the Seventh Circuit reversed a third time, holding that because of the article's omission of the word "alleged" Pape had made a sufficient showing of actual malice to go to the jury. *Pape* v. *Time, Inc.*, 419 F. 2d 980 (1969). (Appendix "D", *infra*.)

(b) The Background of Pape's Libel Suit: Monroe v. Pape.

In 1961, this Court decided *Monroe* v. *Pape*, 365 U. S. 167. The Court held that the plaintiffs, Mr. and Mrs. James Monroe and their six children, were entitled to sue Captain Frank Pape under the Civil Rights Act (R. S. § 1979, 42 U. S. C. § 1983) for constitutional violations claimed to have been committed during a pre-dawn police invasion of the Monroe's apartment. Captain Pape at the time was Deputy Chief of Detectives of the Chicago Police Department and personally led the Monroe raid. (A. 94-97.) The Monroes charged that Pape and his squad of Chicago policemen entered the apartment without a warrant, roused the family from bed at gunpoint, forced Mr. and Mrs. Monroe to stand naked in the living room, ransacked the apartment, physically abused Mr. Monroe and the children, and held Mr. Monroe incommunicado at the police station for ten hours. (A. 294-300.)

After this Court held that the Monroes' complaint was cognizable under the Civil Rights Act, Pape was tried by a jury; the verdict was guilty and a judgment for $8,000 was entered against Pape on January 24, 1963. (A. 318-21.) Pape did not appeal and the judgment was satisfied.

(c) The 1961 Report of the U. S. Commission on Civil Rights—JUSTICE.

Subsequent to the decision of this Court in *Monroe* v. *Pape* but *prior* to the trial, the U. S. Commission on Civil Rights issued its official 1961 Annual Report. The Civil Rights Commission was created by Congress in 1957 to investigate civil rights problems and make recommendations to the President and Congress (42 U. S. C. § 1975). The Commission's declared purpose is "to collect, study,

and appraise information relating to civil rights throughout the country and to make appropriate recommendations to the President and Congress for corrective action." (Vol. 5, 1961 Report, p. ix.) (A. 326.)

Volume 5 of the Commission's 1961 Report—JUSTICE—contains the Commission's observations and findings concerning *Monroe* v. *Pape*. Chapter 2 of JUSTICE, entitled *"Unlawful Police Violence"* (with the sub-title *"Patterns of Police Brutality"*), cites and discusses *Monroe* v. *Pape* as one of eleven specifically enumerated examples of nationwide police brutality against Negroes. The Commission prefaces Chapter 2 with the statement that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; *in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations.* In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. *The Commission is of the opinion,* however, that the allegations appeared *substantial enough* to justify discussion in this study." (Emphasis added.)

"Unlawful Police Violence" (Chapter 2) is divided into four separate classifications of police brutality: (1) racially motivated brutality to enforce segregation; (2) violence as punishment; (3) coerced confessions; and (4) the spontaneous use of force in making arrests. The *Pape* case is included within the fourth category as a spontaneous use of force; the Commission introduces the *Pape* case by the italicized subheading, *Search, seizure, and violence: Chicago 1958.* JUSTICE then summarizes the factual predicate for the *Pape* case by quoting Mr. Justice Frankfurter's language in his dissenting opinion in *Monroe* v. *Pape*, 365 U. S. at 203-04. The Commission's exact language concerning Pape (including footnotes) reads:

"UNLAWFUL POLICE VIOLENCE

• • • • •

"Patterns of Police Brutality

• • • • •

"*Initial Contact and Arrest*

• • • • •

"*Search, Seizure and Violence: Chicago, 1958.* The Supreme Court of the United States decided the case of *Monroe* v. *Pape*[82] on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[83]

> "• • • [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on 'open' charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not

permitted to call his family without criminal charges having been filed against him.

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82. 365 U. S. 167 (1961). See discussion in ch. 5 at 72-73, *infra.*

83. These are the words of Justice Frankfurter in dissent, 365 U. S. at 203-204."

(Commission footnote 82 alludes to another discussion by the Commission of *Monroe* v. *Pape* in Chapter 5 of JUSTICE; Chapter 5 discusses the probable effect of the decision in securing redress of future police brutality and violations of civil rights.)

The conclusions of the Commission from its investigation of police brutality towards Negroes are presented in Chapter 8 of JUSTICE. The Commission recommended to the President and Congress in that Chapter that specific remedial Civil Rights legislation be enacted to discourage and punish police violations of civil rights throughout the country (both in the South and North) (JUSTICE, pp. 105-13). JUSTICE was signed by all six of the Members of the Civil Rights Commission.

(c) The Time Article.

The *Time* article of which Pape complains (A. 332-33) is a report of the issuance of JUSTICE and reads as follows:

CIVIL RIGHTS.

Dawdling on the Corner.

The new paperback has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission.*

The bluntly frank report tells of a police officer refered to only as "Y," in Dawson, Ga., who arrested Negro James Brazier for speeding in November 1957. It quotes Brazier: "When I first entered the door of the jail, 'Y' hit me on the back of the head and knocked me down and said 'You smart son-of-bitch, I been wanting to get my hands on you for a long time.' I said, 'Why you want me for?' 'Y' said, 'You is a nigger who is buying new cars and we can't hardly live. I'll get you yet.' " When Brazier was arrested again five months later by the same officer, Brazier's wife related: " 'Y' then said, 'I told you I would get you.' James said, 'What do you want to hurt me for? I ain't done nothing. I got a heap of little chillun.' 'Y' said, 'I don't give a goddam how many children you got, you're going away from here.' 'Y' pulled out his pistol and stuck it against James' stomach."

Beaten to Death. Continues the report: "Brazier's ten-year-old son pleaded with the officers to stop beating his father and was knocked to the ground by 'Y'; the victim was thrown onto the floor of the police car with his legs dangling outside. 'Y' kicked him twice in the groin, slammed the door on his legs, threw a hat full of sand into his bloody face, and drove off." Brazier died five days later, and "Y" was never punished.

Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice,* "broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to

the floor, dumping drawers, ripping mattress covers." The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment.

Nursing and Flouting. The commission's report concedes that such cases may be "more dramatic than most," but it declares that police brutality is "a serious problem throughout the U. S.," that Negroes suffer from it most, and that "there are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes." To remedy the situation, the commission recommends federal grants to upgrade state and local police forces, a federal law permitting police victims to sue local governments instead of only the officers, who can seldom pay adequate judgments, and an amendment to federal law specifically banning police brutality and forced confessions.

Going beyond the report of the panel, Father Hesburgh issued a separate statement: "Personally, I don't care if the U. S. gets the first man on the moon if while this is happening on a crash basis we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hyocrites to all the world."

---

* Members of the scholarly panel: Chairman Dr. John A. Hannah, president of Michigan State University; Dr. Robert S. Rankin, chairman of Duke University's political science department; Robert G. Storey, former dean of the Southern Methodist University Law School; Spottswood W. Robinson 3rd, dean of Howard University Law School; Erwin N. Griswold, dean of Harvard Law School; the Rev. Theodore M. Hesburgh, president of Notre Dame University.

Pape claimed that the article was libelous and published with actual malice because it did not state that Pape's several described acts of misconduct were merely

unsubstantiated allegations of the Monroes' complaint. (A. 18, 21.)

(d) Time's Editorial Process in the Writing and Researching of the Article.

The article was written by Edward F. Magnuson, a contributing editor for the National Affairs section of Time.[1] Magnuson read the entire JUSTICE Report; he also read a press release of the Civil Rights Commission concerning JUSTICE and two current articles in the *New York Times* discussing JUSTICE's contents. (Defendant's Exhibits "E", "G" and "H".) (A. 173-76, 203.) He then wrote what is substantially the publication in issue.

Magnuson testified that his journalistic purpose was to report the news of the findings of a high level governmental commission. (A. 203.) Magnuson believed at the time he wrote that all the findings of the Commission and the incidents set forth in JUSTICE were true and reliable. (A. 203-04.) He testified that he specifically relied on the statements by the Commission in its Preface to Chapter 2 of JUSTICE that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations" and ". . . the allegations [of misconduct] appeared substantial enough to justify discussion in this study." (A. 204-05.)

Magnuson was asked why he did not state that the Pape episode was included in JUSTICE as simply allegations

1. Magnuson is a graduate of the Journalism School of the University of Minnesota. (A. 201.) Before joining the staff of *Time* Magnuson worked for ten years as a reporter for the *Minneapolis Tribune* where he covered a variety of assignments, including the police beat. (A. 201.)

in the Monroes' complaint and instead wrote that JUSTICE said Pape did the things set forth in the complaint. Magnuson testified:

"Q. You understand the word 'complaint'?
"A. That's right.
"Q. You understand that word 'alleged'?
"A. That's right.
"Q. Therefore, while you did not find the word 'alleged' in the running head, 'Search, Seizure and Violence: Chicago, 1958', you did find it in the body, is that right?
"A. I did, sir, yes; right.
"Q. You found the word 'complaint'?
"A. That's right.
"Q. That said something to you other than the lack of the word 'alleged' in the title 'Unlawful Police Violence'?
"A. *But the word 'alleged' there cannot be taken just in that context. It has to be taken in the context of the entire chapter.*"

* * * * *

"By Mr. Kaveny: Q. Well, I will read it again, sir. It says, '. . . on the basis of a complaint which alleged . . .'
"Mr. Reuben asked you a moment ago to tell us what you thought, so suppose you now tell me what you think. What did you think when you read, '. . . on the basis of a complaint which alleged . . .'? Tell us what that means to you.
"*A. That means to me that the Commission in this case is reporting this incident in terms of a claim being made in a court by the Monroes, but you can't stop there.*
"A. That does not tell me, sir.
"The Court: Let the witness finish answering. Proceed.
"*By the witness: A. (Continuing) But in the context of the entire chapter, it is not a simple allegation because the Commission has also said that we will not include just an allegation that we have not verified in some fashion.*

"Q. That is your conclusion from having read, '. . . on the basis of a complaint which alleged . . .'?

"A. I read the entire chapter.

"Q. There is more here than just an allegation or a complaint?

"*A. In the context of this report there is more than an allegation involved here; that's right.*" (A. 208-09.)

Magnuson further testified:

"Q. What else within the four corners of Justice made you think that the report from Justice was true?

"A. Well, for one thing, the title of this chapter is 'Unlawful Police Violence.' It does not say 'Alleged Police Violence.' Then they go onto a subheading which says, 'Patterns of Police Brutality.' There is nothing about alleged, nothing about any doubts in the Commission's mind. The reference to the Pape incident is called, 'Search, Seizure and Violence in Chicago.' There is nothing about its being alleged or in any way doubtful, so this led me to think that it was entirely, convincingly true.

* * * * *

"Q. Did you believe that your article, when it appeared in *Time* magazine, was true?

"A. I certainly did." (A. 205-06.)

After writing the article, Magnuson sent it to the Time research department to be checked for factual accuracy in accordance with Time's standard editorial procedure. (A. 202, 205.) The article in the normal course was assigned to Time researcher Karen Booth. (A. 202.) Mrs. Booth testified that she read JUSTICE and then found and examined the following materials in Time's editorial reference file (commonly called the "morgue") (A. 220-21):

(1) A *New York Post* article published February 27, 1961 in that newspaper and headlined "The Suit Against the Chicago Cops: A Father Recalls His Night of Terror" (Def. Ex. "I", A. 226, 355).

The article, in James Monroe's own words, relates that Pape and his men woke Monroe by sticking guns in his chin, paraded him naked in front of his family, called him a "black son of a bitch" and "nigger", tripped and kicked one of the children; the article describes the ransacking of Monroe's apartment and quotes Pape as saying "If it's the last thing I do, I'm going to kill them two black niggers."

(2) A Time correspondent's private report from Chicago dated February 22, 1961 entitled "A KICKED-IN DOOR (Take One)" (Def. Ex. "J", A. 226, 359). This detailed account of Pape's raid on the Monroe family was sent to Time by its Chicago correspondent after an independent investigation of the incident. The report includes the statements that Monroe's son was knocked to the floor with the butt of a pistol as he opened the rear door for Pape and his men; the police forced Monroe naked from bed at gunpoint; Mrs. Monroe was "snatched" naked out of bed with only a blanket wrapped around her; her closet and dresser were ransacked and the mattresses ripped open in the bedrooms during the search. The dispatch states that police cursed the children and the Monroes and when one of the girls tried to leave and call the police she was knocked down by one of the officers.

(3) A Time Washington correspondent's report dated February 22, 1961, entitled "Supreme Court" (Def. Ex. "K", A. 226, 363). That report discusses the Supreme Court opinion in *Monroe* v. *Pape* and its consequences.

(4) A proposed (and never published) news article

written by a Time Chicago correspondent on February 21, 1961, entitled "TERROR ON TRUMBULL STREET" (Def. Ex. "L", A. 226, 369). Time's Chicago correspondent suggested "a look at this horror story" behind the *Monroe* v. *Pape* Supreme Court case including "brutal abuse, ransacking, false arrest, death threats."

(5) A report from Time's Washington Correspondent filed February 20, 1961, captioned "The Supreme Court" and "Another Monroe Doctrine" (Def. Ex. "M", A. 227, 371). The dispatch suggests a story on the *Monroe* v. *Pape* case and refers to the humiliation of Chicago Negro James Monroe in front of his wife and children as he was arrested and his apartment ransacked by Pape and 13 police officers.

(6) A 1951 report to Time by one of its Chicago correspondents entitled "Chicago Cop" (Def. Ex. "N", A. 227, 372). This report refers to an incident prior to Pape's raid on the Monroes where Pape shot and killed a Chicago hoodlum, the sixth such person Pape had shot in the line of duty.

(7) A newspaper clipping dated December 21, 1947, headlined "THIS DEAD-EYE DICK POISON TO HOODLUMS" (Def. Ex. "O", A. 228, 375). The clipping describes Pape's shooting of his fourth victim in the line of duty; when a fleeing accused murderer lunged at Pape, Pape shot and killed him.

(8) A *New York Times* article February 21, 1961, entitled "High Court Backs Suing of Police" (Def. Ex. "P", A. 228, 376). The article recites the claims that Pape and twelve police officers broke into Monroe's apartment at 5:45 A. M., hit Monroe, made him and his wife stand naked while they

searched the apartment without a warrant, then held Monroe illegally before releasing him without charges.

Mrs. Booth testified unequivocally that on the basis of her research of Time's files and her review of the JUSTICE report, she was convinced that the Time article as printed was accurate and true. (A. 228, 231-32.)

(e) Pape's Evidence.

Pape's evidence at the trial consisted of his testimony and the testimony of his fellow police officers who had conducted the raid of the Monroes' apartment; he attempted to demonstrate that the police conducted the entry and search of the Monroe apartment and the arrest of Mr. Monroe in a gentle and considerate fashion, and that there was no physical or verbal abuse.

Pape at the time of the raid believed Monroe to be a cold blooded murderer and he knew that Monroe had a police record (A. 109); Monroe supposedly also had a male accomplice to the homicide and Pape testified he could not be sure that both men were not secreted in the Monroe apartment. (A. 126-27.) Additionally, the Fillmore District in which the Monroe apartment was located is known in Chicago and by the police to be a very high crime rate district. (A. 115.) Accordingly, before and during the raid and the arrest, Pape and his squad undertook the following precautions and safeguards:

A. Shortly after midnight Pape assigned two plain clothes police officers to reconnoiter the Monroe apartment (A. 116); Pape then arranged a pre-dawn rendezvous in the vicinity of the Monroes' apartment taking *seven* police officers with him. (A. 118).[2] The

2. None of the officers were in uniform and their police cars were unmarked (A. 56, 119.) The officers did not have a search warrant. (A. 45.)

raid was scheduled for early morning when Pape would likely accomplish the greatest surprise. (A. 122.)

B. Pape, upon arriving at the Monroe apartment, assigned at least three officers to watch the front and back doors in order to "guard against any type of escape." (A. 123-25.) All of the police officers were well-armed and Pape himself carried both a .38 and .44 caliber pistol with him. (A. 120.) During the entire raid Pape had his hand on his gun and was, he testified, at all times ready for trouble. (A. 109-110, 128, 135, 140, 142-44.)

C. Upon entry into the Monroe apartment, Pape and his body guard with guns and flashlight went immediately and swiftly to the Monroes' bedroom and at once arrested Monroe who was sleeping in bed with his wife Flossie. (A. 96, 105-06, 110.) The Monroes were then both forced out of bed and their six children in the apartment were all wakened and the entire apartment was thoroughly searched for weapons and stolen goods. (A. 55-56, 141-48.) Monroe was held in custody in the living room in his underwear and was finally allowed to put on some pants (A. 56, 97); Monroe then was handcuffed and led away. (A. 32.)

Pape claimed the "visit" he and seven fellow policemen made to the Monroe apartment was without trouble, untoward incident, or misconduct. (A. 271, 157.) Pape claimed that all of his conversations with the Monroes were in a normal tone and that no one was unduly concerned (A. 151-52); Pape believed no one in the apartment was frightened by the presence of the police. (A. 157.) Pape testified that the only trouble was caused by Monroes' children, ranging in age from teenagers to a baby in a basket. (A. 99, 151.) All of the officers appearing below claimed that no members of the raiding party had anything

but "polite" conversations with the Monroes and that the only element marring the calm and peace of the early morning raid was the Monroes' children who became unruly. (A. 151-52, 156-57, 56, 60-61, 78-79, 82.) Pape did not call any of the Monroes as witnesses.

(f) The Directed Verdict in Favor of Time, Inc.

At the close of all the evidence, Time moved for a directed verdict on the ground that Pape had failed to meet his burden of proving actual malice as required by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) and later cases. The District Court granted the motion and directed a verdict for Time. In a Memorandum Opinion (Appendix "A", *infra*), the District Court thus explained the reasons for granting a directed verdict:

> ". . . [T]he plaintiff has the burden of proving 'with convincing clarity' that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as 'substantially' true. This case is far easier than the *New York Times* v. *Sullivan* case, *supra*, where there was no investigation whatsoever into the truth or falsity of the advertisement's representations. This case also does not fall within the *St. Amant* description of what kinds of publications fell outside the protections of the First Amendment.
>
> * * * * *
>
> "Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a 'chilling effect' on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publication

to enter into expensive litigation. *Dombrowski* v. *Pfister*, 380 U. S. 479. . . ."

The Seventh Circuit reversed and remanded, holding that Pape had sustained his *New York Times* actual malice burden so that the case should go to the jury (Appendix "D", *infra*).

SUMMARY OF ARGUMENT.

The decision of the Seventh Circuit is diametrically in conflict with the holdings of this Court and other Circuits in defining and applying the First Amendment concept of *New York Times* actual malice.[3] The Seventh Circuit isolated and focused on one single factor to find actual malice, to the complete and absolute disregard of all the other evidence concerning the editorial methodolgy followed in preparation of the article and the uncontradicted beliefs of the writer and researcher that it was

3. The Seventh Circuit's holding that Captain Pape is a "public official" within the meaning of the *New York Times* case is of course correct. As Deputy Chief of Detectives of the Chicago Police Department, Captain Pape was both a "public official" and a "public figure". Moreover, "public interest" was involved in the subject matter of the article, *i.e.*, a report on the findings and recommendations of the United States Commission on Civil Rights to the President and Congress. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Curtis Publishing Co.* v. *Butts and Associated Press* v. *Walker*, 388 U. S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc., et al.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969); *Farnsworth* v. *Tribune Co.*, 43 Ill. 2d 286 (1969); *Bon Air Hotel, Inc.* v. *Time Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd*, ... F. 2d ..... (3d Cir. 1970); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969).

true. Even the most cursory reading of the trilogy of opinions of the Seventh Circuit in this case (Appendices "B", "C" and "D" *infra*) plainly reveals one dogmatic and unswerving thesis, *i.e.*, that Time's omission of the word "alleged" in describing JUSTICE's account of the *Monroe* v. *Pape* episode is sufficient, *standing alone*, to allow a jury to find Time guilty of libel. Other *New York Times* decisions have rejected such a constrictive approach and have held that all evidence pertaining to the publication and its origin must be considered to establish actual malice with the "convincing clarity" required by the First Amendment.

The first Seventh Circuit opinion, written *prior* to *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), stated that under Illinois common law rules of libel a jury could hold *Time* liable because it "could read the *Time* article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did.*" (Appendix "B", *infra* p. A15.). Then, after the *New York Times* case had discarded common law libel concepts in favor of the First Amendment test of actual malice, the Seventh Circuit in its second opinion purported to pay obeisance to *New York Times* but ruled that omission of the word "alleged" in the Time article was sufficient to permit a jury to find Time guilty of *actual malice, i.e.*, "recklessness." In so holding, the Seventh Circuit cited and relied upon its first *Pape* opinion declaring that Time's omission of the word "alleged" was sufficient under the pre-*New York Times* common law rules to allow a jury to find a libel of Pape. (Appendix "C", *infra*, p. A23.)

Now, after a full trial on the merits of the constitutional issue of actual malice, the Seventh Circuit has again held unequivocally that omitting the word "alleged" *standing*

alone constitutes a sufficient showing of actual malice to go to the jury. (Appendix "D", *infra.*) Despite the manifest and uncontradicted editorial belief of the writer that the article was true, and despite the unchallenged independent verification and corroboration of the article by the researcher, the Seventh Circuit has held that Time can be found guilty of actual malice. In sum, the Seventh Circuit found actual malice demonstrated because it disagreed with the author's editorial decision not to use the word alleged to express his good faith belief and understanding of the import of the Commission's JUSTICE Report.

We submit that there could not be a clearer or more direct conflict between the decision of the Seventh Circuit and the holdings of this Court and other Circuits. The decision should be reversed and the cause remanded with directions to reinstate the directed verdict and judgment of the District Court in favor of defendant. If allowed to stand, the Seventh Circuit's decision will have precisely the "chilling effect" upon the exercise of preferred rights of free public discussion and debate that *New York Times* and its progeny were intended to remove. See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 566 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969).[4]

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4. See also, *e.g.*, *Washington Post* v. *Keogh*, 365 F. 2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967); *United Medical Laboratories, supra; Thompson* v. *Evening Star*, 394 F. 2d 774 (D. C. Cir. 1968), *cert. denied*, 393 U. S. 884 (1968); *Walker* v. *Pulitzer Publishing Company*, 394 F. 2d 800 (8th Cir. 1968); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Kiahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (1966); *Ryan* v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *News-Journal Co.* v. *Gallagher*, 233 A. 2d 166 (Del. 1967); *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Hawaii 1969), *cert. denied*, 396 U. S. 822 (1969); *Bon Air, supra; Sellers, supra; Cerrito, supra.*

ARGUMENT.

I. THE SEVENTH CIRCUIT'S HOLDING DIRECTLY CLASHES WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

(a) The Conflict With This Court's Decisions.

The fundamental concept of actual malice as enunciated in *New York Times* requires a public official plaintiff, such as Pape, to prove "with convincing clarity" that the alleged libel was published "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 280.) This Court has subsequently amplified and elaborated the *New York Times* definition of actual malice in a series of decisions beginning with *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

In *Garrison*, the Court held that the "recklessness" concept of malice requires a showing of "a high degree of awareness of probable falsity" (379 U. S. at 74). In *Henry* v. *Collins*, 380 U. S. 356 (1965), the Court held that "intent to inflict harm" does not suffice—there must be "intent to inflict harm *through falsehood*" (emphasis added); the Court based its reversal of the *Henry* libel judgment on a jury instruction that erroneously allowed the jury to *infer* malice solely "from the falsity and libelous nature of the statement" (380 U. S. at 357). Then, in *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967), the Court ruled that the failure of the defendant to make an investigation prior to publication is insufficient to constitute "recklessness." Finally, and most significantly, the Court held in *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), that the concept of recklessness requires a showing by the plaintiff that the defendant *"in fact entertained serious doubts as to the*

truth" of the publication (390 U. S. at 731; emphasis added).

The decision of the Seventh Circuit is, we submit, at complete loggerheads with every pronouncement of this Court on the subject of *New York Times* actual malice, beginning with the *New York Times* case itself. Indeed, the evidence that the Court held insufficient in *New York Times* to support a finding of actual malice was manifestly stronger than that adduced by Pape below. Thus, in *New York Times* the trial record disclosed:

> *First:* The *New York Times* had evidence in its own files (from news material it had previously published) demonstrating the falsity of several statements in the publication (376 U. S. at 263, 287-88).
>
> *Second:* The Secretary of the New York Times Company admitted he could readily discern that on its very face at least one statement in the publication was false (376 U. S. at 263-64).
>
> *Third:* The *New York Times* accepted and published the assailed advertisement without checking its accuracy against *anything*—either outside sources or the paper's own files (376 U. S. 287).

Upon such a showing, the Court held that the *Times* could not be found guilty of actual malice because the evidence would support "at most a finding of negligence" (376 U. S. at 288). In the case at bar, we submit that the evidence *a fortiori could* not support a finding of actual malice, or for that matter even negligence. Here, the writer of the article, Edward Magnuson, was convinced that his description of the JUSTICE Report's narration of the Pape episode was true, and that omission of the word "alleged" was without editorial significance in light of the entire context of Chapter 2 of JUSTICE, including its preface, headings and sub-heads (see Statement of the Case,

supra, pp. 11-13).[5] So also, in marked contrast to the *New York Times'* complete *lack* of research or verification, the article in this case was submitted to a Time staff researcher, Karen Booth, and was comprehensively checked and verified with the materials in Time's "morgue" or reference file concerning Pape and *Monroe* v. *Pape*, all of which were consistent with the article's contents (see Statement of the Case, *supra*, pp. 13-16).

The Seventh Circuit disregarded this entire methodology of the writer and researcher and focused solely upon the omission of the word "alleged"; if this Court had followed the same approach in *New York Times* and looked at only one fact (such as the materials in the *Times'* files) the Court clearly would have found a sufficient basis for a finding of actual malice. Instead this Court considered *all* of the facts concerning the method and process followed in making the publication and held that there was no actual malice as a matter of law.

The decision below also squarely clashes with *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). There the record revealed that the defendant publisher had made *no* attempt to check or verify the truth of the alleged libel, had *no* knowledge of the plaintiff's past conduct, and had relied solely on the affidavit of a stranger whose veracity and credibility were unknown. This Court nonetheless held that the plaintiff had failed as a matter of law to make a submissible showing of actual malice in the sense of "recklessness"; the Court declared that recklessness requires proof that the defendant "*in fact entertained serious doubts* as to the truth" of the alleged libel (390 U. S. at 731; emphasis

5. It is significant that Circuit Judge Schnackenberg in his dissent on the first *Pape* appeal (318 F. 2d 652, 656-7) reached precisely the same conclusion as did Magnuson. Can it be validly argued that Judge Schnackenberg had "knowledge of falsity" or "serious doubts as to truth"? Yet that is the inevitable result of the third *Pape* decision by the Seventh Circuit being reviewed here.

added). Here, we submit, Pape has made not the remotest showing that either the writer, the researcher or anyone at Time, Inc. entertained "serious doubts as to the truth" of the *Time* article.

So also, the Seventh Circuit's decision is in flat conflict with *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967). In *Beckley* the defendant newspaper had accused the plaintiff of intimidation, threats and other misconduct as a public official; defendant admitted that (unlike in the instant case) *no* research or investigation had been done concerning the accusations, and that they were published because defendant believed there was a *possibility* they were true. This Court, in reversing a judgment for the plaintiff *per curiam*, considered the entire record and held that the evidence was insufficient to present a jury question of whether defendant acted recklessly. Again the proof of actual malice in the instant case falls palpably short of the evidence held insufficient to go to the jury in *Beckley*. Here the article was comprehensively researched in accordance with Time's standard editorial procedure, and both the writer and the researcher believed the article *was in fact true*, not merely that there was a *possibility* it was true (as in *Beckley*).

Other holdings of this Court that we believe are at total odds with the Seventh Circuit's result below are *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Henry* v. *Collins*, 380 U. S. 356 (1965); *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U. S. 130 (1967) (Opinion of Mr. Justice Harlan); *Greenbelt Cooperative Pub. Ass'n* v. *Bresler*, ... U. S. ..... (decided May 18, 1970, No. 413, Oct. Term, 1969).

(b) The Conflict With Other Circuits.

The Seventh Circuit's approach in considering one single and narrow factor (omission of "alleged"), rather than *all* elements of the editorial process in writing and research of the article, is also in square conflict with the decisions of other circuits applying the *New York Times* doctrine. Virtually all other courts, both federal and state, have followed the constitutional mandate of *New York Times* and have examined *all facts* behind the preparation and writing of the publication in determining whether actual malice is a jury issue. Moreover, and signally, a cardinal feature of these decisions is their clear recognition that libel actions of public officials or public figures have a "chilling effect" upon the exercise of First Amendment rights of free public discussion and debate (see *Dombrowski* v. *Pfister*, 380 U. S. 479, 487 (1965)), and that such suits should be terminated as soon as possible when it appears that the plaintiff cannot sustain his burden of proving actual malice "with convincing clarity." This was clearly recognized by the District Judge below in his memorandum opinion granting Time, Inc.'s motion for a directed verdict (Appendix "A", *infra*):

> "Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a 'chilling effect' on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publication to enter into expensive litigation. Dombrowski v. Pfister, 380 U. S. 479 (1965) as cited in Time, Incorporated v. McLaney, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969)."

To minimize the "chilling effect" of libel suits on First Amendment rights, decisions of other circuits have held that defendant-publishers are entitled to summary judg-

ments or dismissals without the necessity of submitting the case to a jury when it appears on the basis of *all* affidavits, depositions or other adduced evidence that the plaintiff cannot sustain his burden of proving actual malice. Thus, in *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969), the defendant took an interlocutory appeal from the trial court's refusal to grant summary judgment against the plaintiff; the Fifth Circuit reversed and held that First Amendment considerations compelled immediate termination of the suit:

> "The subject matter of this litigation, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski* v. *Pfister*, 380 U. S. 479, because of the chilling effect of such litigation." (406 F. 2d at 566.)

In the *McLaney* case, the allegedly libelous article accused the plaintiff of being connected with organized crime and gambling in the Caribbean. The Fifth Circuit observed that a "substantial investigation" had been made into the truth of the alleged libel and that the author had no reason to have serious doubts as to the truth of the publication. Precisely the same is true, we submit, in the instant case.

An equally emphatic declaration of the "chilling effect" principle is *Washington Post Co.* v. *Keogh*, 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967):

> "One of the purposes of the [*New York*] *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials,

> is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes.* All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against the trial on the merits. *Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.* And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' *Smith* v. *People of State of California*, 361 U. S. 147 (1959)." (Emphasis added.)

To the same effect, and equally in conflict with the holding of the Seventh Circuit below, is *New York Times Co.* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966).

The recent decision in *Wasserman* v. *Time, Inc.*, ... F. 2d ..... (D. C. Cir., Docket No. 23,267, decided March 3, 1970) (reproduced as Appendix "E," *infra*) also clearly highlights the fundamental error of the Seventh Circuit in applying the *New York Times* doctrine. Although the Court of Appeals in that case held that summary judgment was inappropriate on the pre-trial record then before the court (compare the second opinion of the Seventh Circuit in the instant case, Appendix "C," *infra*) the opinion of Judge J. Skelly Wright (concurred in by Judge Spottswood W. Robinson, III) clearly delineated the correct constitutional procedure for evaluating and determining whether a *New York Times* plaintiff has made a submissible showing of actual malice:

"In my Judgment *New York Times Co.* v. *Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard of the truth. * * *.

"If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the Times instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'

"This two-step procedure in which *both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff* provides the protection of the First Amendment freedom that Times sought to make secure in areas of public concern."

We submit that the Seventh Circuit's decision is also in conflict with *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied* 394 U. S. 921 (1969); *All Diet Foods Distributors, Inc.* v. *Time, Inc.*, 56 Misc. 2d 821; 290 N. Y. S. 2d 445 (Sup. Ct. N. Y. Co., 1967); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969, *aff'd*, ...F. 2d ..... (5th Cir. 1970); *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (Ct. App. 1966); *News-Journal Co.* v. *Gallagher*, 233 A. 2d 166 (Sup. Ct. Del. 1967); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774 (D. C. Cir.

1968) *cert. denied*, 393 U. S. 884 (1969); *Walker* v. *Pulitzer Pub. Co.*, 394 F. 2d 800 (8th Cir. 1968); *Ryan* v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Sup. Ct. Hawaii, 1969), *cert. denied*, 396 U. S. 822 (1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd*, ... F. 2d ..... (3rd Cir. 1970); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969).

II. THE FUNDAMENTAL MISCONCEPTIONS OF THE SEVENTH CIRCUIT.

By concentrating entirely upon omission of the word "alleged"—an omission that was made by the writer in the sincere and undisputed belief that it was editorially irrelevant and in no way made the story untrue—the Seventh Circuit has undermined the central meaning and purpose of the *New York Times* doctrine and has created dangerous precedent in this critically important area of constitutional law. We submit this Court should forthwith rule that no court has the right to substitute its editorial judgment for that of a publisher; this clearly is the essence of First Amendment protection. Does a publisher have the right in good faith to omit something that it believes to be editorially inconsequential? To state the question impels the answer—yet that is all that is involved in this case.

The Seventh Circuit's erroneous decision on the simple question stated above was based on two misconceptions, each basic to an understanding of the *New York Times* rule. First, it erroneously held that a knowledgeable editorial decision includes, by the very fact of knowledge of the decision (which any responsible journalist will always have), knowledge of falsity. Second, it erroneously held that a court is free to substitute its *own* editorial discretion for that of the publisher in making a judgment as to truth or falsity. Both conceptions are erroneous:

(1) Knowledge of Falsity by Reason of Knowledge of Omission.

The Seventh Circuit, in its anxiety to superimpose its own editorial judgment upon that of the Time writer and researcher, totally misapprehended the test it was required to apply in judging whether the publication was entitled to constitutional protection. Thus, in *New York Times*, this Court explicitly stated: "A defense for erroneous statements honestly made is no less essential here" (376 U. S. at 278.) and barred action on such statements "believed to be true" (*Id.* at 279). Again, in *Garrison*, this Court stated that: "Utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth" (379 U. S. at 73).

The Seventh Circuit completely disregarded those utterances in reaching its conclusion that there was a basis for denial of constitutional protection; its conclusion was based solely upon the following statement:

> "However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit." (Appendix "D", *infra* at p. A27.)

All the court is saying is that Magnuson knew that he was omitting a fact. This does not cover the further, and essential point, that, in Magnuson's view (as testified at the trial) the omission of that fact made the story true. The essential inquiry is not whether Magnuson knew what he was doing—rather, it is whether Magnuson, knowing what he was doing, "honestly believed" in the truth of that which was said. What the Seventh Circuit in fact has done after making its own editorial judgment of "falsification," is to find (without support) that the omission that led to its view of "falsification" was deliberate, and then

bridge the gap of proof of lack of honest belief by a total *non sequitur, i.e.,* since what was said was false Magnuson failed to believe in the truth of what he said. That *non sequitur* is the crux of this case. One cannot infer knowledge of falsity from knowledge of an editorial decision deliberately to omit in order to print what the writer believed to be the truth. And that is the simple but basic question presented by this case.

(2) The Seventh Circuit's Unsound Journalistic Judgment —Time's Version of What the Report Said as a "Falsification".

The Seventh Circuit's substitution of editorial judgment for that of the author and researcher was totally in error.

As confirmed in the press release issued by the Commission and used by Magnuson (A. 335-47) the Commission concluded that: "Indeed, a comprehensive review of available evidence indicates that police brutality is still a serious and continuing problem" (A. 336). That statement was corroborated by the specific finding to that effect set forth in the press release (A. 342). That same finding was included in the New York Times clip used by Magnuson (A. 353-57). Is it believable that the United States Civil Rights Commission, with men of national eminence, would base a *finding* of police brutality as a continuing problem on the mere allegations of the Monroes' complaint?

Of course it is not and we submit that the reason the complaint's allegations were included in the Report was stated specifically by the Commission in its Introductory Remarks to the Chapter on "Urlawful Police Violence", *i.e.*, that the allegations had been investigated and *"the allegations appear substantial enough to justify discussion in this study."* (Emphasis added.) Thus, on the face of the Report, it appeared that the quotations from the com-

plaint were not inserted *qua* allegations of a complaint but, rather, as statements of fact that had been substantiated. Magnuson could hardly then be declared guilty of actual malice for so believing and so reporting.

Indeed, Time's report of JUSTICE could hardly be "true" if it repeated the Commission's Pape narration as being simply a report of the allegations of the Monroes' complaint. Rather, in truth, and as presented by the Commission in its complete Report, the Monroes' allegations were allegations of fact which had been investigated and were substantial enough to merit a finding by the Commission of police brutality. Pape's claim that Time's story was a "falsification of what the Report said", is a total misreading of the Commission's Report; Time's story correctly reported and interpreted the gist of the Report.

Moreover, Booth, the researcher, who re-checked Magnuson's judgment as to what the Report said, had available in her files, aside from the complaint in the *Monroe* action, substantial proof of the truth of the Commission's Pape narration. Time's Chicago reporter Doust had investigated and reported in his dispatch of February 22, 1961 (A. 359-62) the entire story and that dispatch was backed up by the New York Post clipping of February 27, 1961, read by Booth, that quoted Monroe as to his side of the story in detail (A. 356-57). And those facts also substantiated by the dispatches of 3/24/51 and 12/21/47 (A. 372-75), branding Pape as a "Killer Cop". Finally, the correctness of Time's view that the Commission's Report stated facts rather than allegations was later confirmed by the fact of a jury verdict against Pape and in favor of Monroe.

What more is needed to demonstrate a belief of the truth as a matter of law? The Report on its face as available to Magnuson and Booth and judged by them, was more than a report of mere allegations of a complaint. Booth knew

that it was backed up by specific dispatches to the effect that the story was true. And, thereafter, a jury verdict found the story was true. To have published the story as suggested by the Court of Appeals in its opinion would have been untrue—and that is the very reason Courts should not attempt to be journalists and the very reason why the First Amendment bars such an attempt. If ever a man appeared to have been guilty of what was said, it was Pape, despite his protestations to the contrary. And if ever anyone acted "in good faith" and "honest belief" in truth, it was Magnuson and Booth. And that should be the end of the case under *New York Times*.

The District Court specifically found Magnuson's "personal good faith" (A. 408-09) and that finding, we submit, is significant. If the District Court believed there was no actual malice, then even if (as the Seventh Circuit ruled) Time erroneously read the Commission's Report, the record is still lacking in evidence to show the "high degree of awareness of probable falsity" needed in order to lose the protection of the Constitution. See the statement of Judge Skelly Wright in *Wasserman* v. *Time, Inc.*, quoted at page 29, *supra*. Indeed, we submit a mere reading of the testimony of Magnuson plus the exhibits relied on by Booth should suffice to show their good faith. We think the Seventh Circuit unconstitutionally failed to give any consequence to the record, and totally disregarded the District Court's hearing and seeing the witnesses and exhaustive review of the testimony and exhibits.

III. THE GRAVELY CHILLING EFFECT OF THE SEVENTH CIRCUIT'S DECISION.

As previously discussed, both this Court and other Circuits have recognized and squarely held that avoidance of a chilling effect is necessary to maintain the vitality of the First Amendment. The instant case and the proceedings below place in bold relief the insidious and chilling effect of a failure to terminate a libel suit involving the public interest at the earliest possible moment. The petitioner has been in litigation since 1961 and has been required to defend extensive pretrial proceedings, a trial on the merits and three appeals. We believe that in light of the history of this marathon, allowing the Court of Appeals' decision to remain undisturbed must necessarily inhibit all but the hardiest of publishers. Indeed, in light of all that has transpired in the instant case, if, as we believe, the Seventh Circuit's decision below is in error, the necessary expense and travail that has and will transpire here must have a manifest chilling effect.

Moreover, and we think cardinally, if a jury trial is compelled in this case in contravention of the *New York Times* cases, the chilling effect upon publishers will be compounded incalculably. The 1968 Democratic Convention in Chicago has engendered strong and violent emotions in much of the City of Chicago concerning the role and conduct of police. Thereafter, the city was harshly divided by the September 1969 Weathermen convention, the subsequent police raid and killings at the Black Panther headquarters, and the Federal Grand Jury report on the Black Panther raid in May, 1970.

The recently concluded and much publicized "Conspiracy 7" Trial has increased this emotional pitch. At this time, there would be scant few publishers that would not be reluctant to submit to a jury trial in a libel suit involving

the conduct of Chicago police in Chicago in 1970. If the decision below is allowed to stand, many publishers in the future may well avoid the plight by simply not printing about Chicago, its police and its violence.

CONCLUSION.

For the reasons set forth above, we submit that the decision of the Seventh Circuit should be set aside and the judgment of the District Court dismissing this action be reinstated.

Respectfully submitted,

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June 9, 1970.

APPENDIX "A".

Opinion of the United States District Court for the Northern District of Illinois, Eastern Division.

FRANK PAPE, *Plaintiff*,

vs.

TIME, INCORPORATED, *Defendant*.

No. 61 C 2202.

THE HONORABLE EDWIN A. ROBSON, *District Judge*.

The defendant has moved for a directed verdict at the close of all the evidence. For the reasons set forth below, this court is of the opinion that the motion should be granted.

The plaintiff, Frank Pape, is suing Time, Incorporated for libel allegedly arising out of an article published November 24, 1961, which described the search of James Monroe's apartment on the west side of Chicago and Monroe's subsequent arrest by the plaintiff and seven fellow police officers. The plaintiff is a "public official," *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965), and in order for such a public official to recover a libel judgment against the present defendant, he must prove "with convincing clarity" that the article was false and was pub-

lished with actual malice. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285-286 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). "Actual malice" has been defined as false statements published with knowledge that they are false, or with reckless disregard as to their truth or falsity. *New York Times* v. *Sullivan, supra.* "Reckless disregard" may be shown to exist where there exists "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant, supra*, at 731. In addition, "recklessness may be found where there are obvious reasons to doubt the accuracy of [an] informant or the accuracy of his reports." Id., at 732. In order to preserve First Amendment rights, it is clear that "some erroneous publications [must be protected] as well as true ones." In determining whether actual malice exists, the writer's personal belief that his story is true is important, but is only one factor to consider. Id., at 732.

In the article complained of in this case, the defendant's writer, Edward F. Magnuson, a veteran reporter, purported to quote part of the publication, Justice, which was compiled by the members and staff of the United States Civil Rights Commission. The portion of the article complained of is as follows:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says Justice, 'broke through two doors, woke the Monroe couple with flashlights, and forced them to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him

"nigger" and "black boy." Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment." Time magazine, November 24, 1961, at 16.

This quote omits the words which immediately preceded it. The Justice report states that these were allegations contained in a complaint. This omission, which has been ruled to be at least "negligent" is not enough to sustain the plaintiff's burden of proof (as outlined above), since the standard for actual malice is far stricter than the standard for negligence. *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965). This court, therefore, must look further into the background of this article.

Mr. Magnuson testified that he read the omitted words, but decided not to include them in the article as it appeared in Time magazine. He explained the omission by pointing out that the Civil Rights Commission, appointed by the President, was set up by Congress to report on the problems of minorities, and its members were highly respected individuals. This meant to him, he testified, that if an example was used in the text of the report, it was considered by the Commission to be "substantially" true, no matter how the example was worded. In some of the examples, the words "alleged" or "allegation" were not used; in others, such as the one before this court, those words were used. Although the Justice report did warn that they had made no conclusive determination of the correctness of the statements of the complainants or officers, the report also said that "the allegations appeared substantial enough to justify discussion in this study."

Justice, at 5. This statement modifies the whole report, and thereby makes almost all the examples contained in the report "allegations" of one sort or another, except where (in two cases) convictions had been obtained. Therefore, the appearance of the word "alleges" at the beginning of the section in Justice describing the plaintiff's activities is not of controlling significance. It was undisputed in the record that Mr. Magnuson in personal good faith interpreted the word "alleges" in the light suggested above. Professions of good faith, however, may not be sufficient in certain cases. *St. Amant, supra.* It is vital to describe the research that went into this article.

It has been stipulated between the parties that Mr. Magnuson consulted three sources before he wrote the article: the Justice report itself, a press release issued by the Civil Rights Commission concerning its Justice volume (Defendant's Exhibit [DX] G), and a news article in the New York Times of November 17, 1961 (DX H). All of these, if they mention the Pape incident at all, refer to the fact that the statements were contained in a complaint. After the article was drafted, it was sent to Champ Clark, then editor of the National Affairs Section, who in turn, according to an established procedure, sent it to the defendant's Research Department. The article was checked for factual accuracy by Miss Karen Burger (now Mrs. Karen Booth), whose deposition was read in open court. Her job was to make corrections in consultation with the senior editor and the writer. She testified that she did not call the omission to their attention, since she had determined that the writer had good reasons for the omission and that the quote was factually accurate. In order to make this determination, she rechecked the three sources that Magnuson used, and also consulted the defendant's informational reference library, commonly known as the "morgue," and obtained all the materials relating to Frank

Pape and the case of *Monroe* v. *Pape*, 365 U. S. 167 (1961). Stipulation, ¶¶ 25 and 26; DX I through DX P. In order to determine what information was available to the defendant, it will be necessary to examine some of these documents in more detail.

The article from the New York Post of Monday, February 27, 1961, DX I, purported to be a first person account by James Monroe of the events surrounding his arrest and subsequent release. The article does not state explicitly that Monroe's statements were merely allegations in a complaint, and the facts related by Monroe follow substantially the account given by Magnuson in the accused article. However, it should be noted that in the introductory paragraphs, the Post said that the narrative which followed was in Monroe's own words and was his "recollection of what happened." The introduction also points out that the Supreme Court has only allowed Monroe to "sue 13 white policemen for abusing him and his family," and that, impliedly, the actual facts might not be as described in the narrative.

The New York Times article (DX P) of February 21, 1961, sounds a similar cautionary note. It said that "[a] Chicago Negro handyman, James Monroe, brought the case after thirteen city policemen broke into his apartment early one morning. He said that they hit him, made him and his wife stand naked while they searched the apartment without a warrant, then held him illegally in jail before finally releasing him without charges." (Emphasis added.) The reference to the fact that a case was brought, and that Monroe "said" that he had been abused highlight the apparent lack of certainty which the New York Times evidenced. Exhibit L also emphasized the fact that Monroe only "claimed" that certain facts were true, and this exhibit was a dispatch from Time's Chicago Bureau correspondent, Dudley Doust. Doust filed another report, one

day later than Exhibit L, in which he did not mention that Monroe was only "claiming" that the incidents occurred (DX J). The account in this exhibit did support the statements as made in the accused article. The other articles refer to the decision in *Monroe* v. *Pape*, *supra*, and do not otherwise discuss the facts, or, they refer to the plaintiff as being an "ungodly tough," but much-decorated police officer. DX K, DX M and DX N.

The Seventh Circuit Court of Appeals, albeit before the *St. Amant* decision, *supra*, had determined that the defendant, when it reworded parts of the Justice report, took the risk that it "might go too far," and indicated that a jury, on the facts before it, could decide that the defendant's acts were "reckless." *Pape* v. *Time, Incorporated*, 318 F. 2d 652, 655 (7th Cir. 1963), as quoted in *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965). However, the court did not have the complete record before it, as is presently the situation before this court.

Even though the defendant showed at trial that the Monroes recovered an $8,000 judgment against the plaintiff for violating their civil rights, this court assumes for the purpose of argument, that the plaintiff has established, through the eight police officers' testimony, that the statements in the article were substantially false. Even assuming his, the plaintiff has the burden of proving "with convincing clarity" that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as "substantially" true. This case is far easier than the *New York Times* v. *Sullivan* case, *supra*, where there was no investigation whatsoever into the truth of falsity of the advertisement's representations.

This case also does not fall within the St. Amant description of what kinds of publications fell outside the protections of the First Amendment. There the court said, at 732:

> "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." (Emphasis added.)

This decision, after the cases in the Seventh Circuit, indicates that where good faith can be shown, as here, and there has been no "fabrication," etc., the First Amendment demands that judgment be rendered for the defendant publisher. Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a "chilling effect" on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publisher to enter into expensive litigation. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), as cited in *Time, Incorporated* v. *McLaney*, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969).

At the close of plaintiff's case, defendant moved for a directed verdict. The court might well have granted this. However, in the exercise of extreme caution and with due regard for the statements made by the Court of Appeals in the other *Pape* cases, *supra*, the court decided to wait

until all of the evidence was in and a complete record was made. At the conclusion of the introduction of all the evidence, any lingering doubt that the court may have had was completely eliminated.

It is therefore ordered that the defendant's motion for a directed verdict at the close of all the evidence be, and it is hereby granted.

It is further ordered that judgment be and it is hereby rendered for the defendant on the issue of liability, and the cause is hereby dismissed without costs.

/s/ EDWIN A. ROBSON,
Judge.

January 16, 1969.

APPENDIX "B".

First Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

v.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 25, 1963

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity libel suit charging that Time, Incorporated, publisher of a national weekly news magazine, defamed plaintiff Pape in an article based on *Justice,* volume 5 of the 1961 report of the United States Commission on Civil Rights.[1] The District

1. Created by the Civil Rights Act of 1957, 42 U. S. C. § 1975, to study civil rights problems and report to the President and Congress. The Supreme Court described the Commission's statutory duties in *Hannah* v. *Larche,* 363 U. S. 420, at 441 (1960):

> • • • its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does

(Footnote continued on next page.)

Court dismissed the complaint on Time's motion, and plaintiff has appealed.

Time's motion admitted, for purposes of this appeal, the well pleaded facts: Plaintiff, at the time of the alleged libel, was Director of Security for Chicago Thoroughbred Enterprises, Incorporated, which operated race tracks in metropolitan Chicago. He was on leave from his position as a captain of Chicago Police. He enjoyed a good reputation.

In its issue of November 24, 1961, Time published the alleged defamatory matter in reporting the filing of *Justice* by the Commission. The material subject of suit appears under "Part VII. Equal Justice Under Law." In Part VII are two chapters: "1. Introduction; and 2. Unlawful Police Violence."

Chapter 2, "Unlawful Police Violence," briefly describes eleven typical cases of police brutality. The Commission states: "The allegations of misconduct are supported in several cases by criminal convictions * * * or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in the study."[2]

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not make determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

2. 5 U. S. Comm. on Civil Rights Report 5 (1961).

The Time article, captioned "Civil Rights—Dawdling on the Corner,"[3] was based on that part of Chapter 2 of the Commission Report entitled "Patterns of Police Brutality." Time noted the publishing of *Justice* by the Commission and went on to report incidents in Georgia and Chicago, two of the eleven incidents revealed in the Commission Report. The Chicago incident involved the arrest by Pape and other Chicago police officers of a Negro family named Monroe on Chicago's west side.[4]

This District Court's opinion, sustaining Time's motion to dismiss, was that the article was a fair and accurate account of the Commission's Report, a matter of public interest and legitimate subject of comment of an honest purpose; and that the article did not exceed the bounds of fair comment and was not actionable.

The question is whether the District Court erred in finding, under Illinois law, that the complaint failed to state a claim upon which relief could be granted. The subordinate, vital question is whether Time's report of what the Commission said about the Pape incident is fair comment.

Time's article introduced the reader to *Justice* as carry-

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3. The caption "dawdling on the corner" is taken from a separate statement filed in the Report by Reverend Theodore M. Herburgh, C. S. C., President of the University of Notre Dame, and a Member of the Commission. In part, Commissioner Hesburgh stated:

> Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world.

5 U. S. Comm. on Civil Rights Report 168 (1961).

4. Based on the alleged wrongful conduct of Pape and his fellow officers in making that arrest, Monroe brought a civil rights suit which, on appeal, *Monroe* v. *Pape*, 365 U. S. 167 (1961), was remanded for trial to the Northern District of Illinois, Eastern Division.

ing "a chilling text about police brutality" and that "it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission." The reader is told, in a footnote, who the noted educators are.[5] Time's second paragraph begins, "The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Ga." This and the third paragraphs tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, "Brizier died five days later, and 'Y' was never punished." In the fourth paragraph Time reported the Pape incident.

The Pape incident is set forth in the Commission Report in this way:[6]

> . . . [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apart-

5. Members of the United States Commission on Civil Rights: Chairman Dr. John A. Hannah, President of Michigan State University; Vice Chairman Robert G. Storey, head of Southwestern Legal Center and former Dean of Southern Methodist University Law School; Reverend Theodore M. Hesburgh, President of the University of Notre Dame; Dr. Robert S. Rankin, Chairman of the Political Science Department, Duke University; Erwin N. Griswold, Dean of the Harvard University Law School; and Spottswood W. Robinson III, Dean of the Howard University Law School.

6. U. S. Comm. on Civil Rights Report 20, 21 (1961).

> *Search, seizure and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[7]

7. The Commission set forth the facts alleged in the complaint by quoting from Justice Frankfurter's dissent in *Monroe* v. *Pape*, 365 U. S. 167, 202-259 (1961).

ment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.

Time began its report of the Commission's statement of the Pape incident this way: "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder." It continued: "The police, says *Justice*, broke through two doors * * *." Time then quoted the rest of the statement of the Commission verbatim. The Time paragraph concludes: "The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

We agree with the District Court that Time was not absolutely privileged in writing the article. The absolute privilege of the Commission did not protect Time. It had a "qualified or conditional privilege," *Cresson* v. *Dispatch Printing Co.*, 291 Fed. 632 (D. C. Minn. 1923), to comment

fairly upon, and criticize fairly, the Commission report. Under Illinois law, governing here, Time can be liable if it goes beyond that limit and "states as a fact that which is not true * * *." *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 64 N. E. 2d 751, 761 (1945), *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, 128 N. E. 2d 638 (1955). "It is fundamental that fair comment and criticism cannot be predicated on an unfair or false statement of facts." *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, at 494, 128 N. E. 2d 638, at 640. The rule applies to writing about crime. *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 585, 64 N. E. 2d 751, 763 (1945).

The test of the fairness of the Time article is the meaning which readers of common and reasonable understanding would ascribe to the language used. *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, 493, 128 N. E. 2d 638, 640 (1955). And as Justice John C. Lewe said in *Dilling* v. *Illinois Publishing & Printing Co.*, 340 Ill. App. 303, 306, 91 N. E. 2d 635, 637 (1950), "* * * a person of ordinary intelligence should read a newspaper article * * * with ordinarily intelligent discrimination."

The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by the introduction, conditioned by the Georgia incident and its stark ending, and prepared to read how the Chicago police treated Monroe's family in the very early morning while "ostensibly" investigating a murder. Then the reader is told that *Justice* "says" Pape and others *did* what the Report merely said Monroe's complaint *alleged*. Pape and others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated "Y", in the Georgia incident, was not punished.

We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go to far, *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 582, 64 N. E. 2d 751, 761, 763 (1945), quoting Judge O. W. Holmes, Jr. A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did*. The typical newspaper reader could take from the article the impression that Pape and the other officers were not really investigating a murder when they mistreated the Monroe family, that the noted educators in *Justice* found that the Monroes were mistreated by Pape and the other officers, and that they were not being punished but ought to be.

It is true that the Commission had the facts alleged in the *Monroe* complaint, from which it quoted, investigated sufficiently to justify their use for the Commission's purposes in the Report. But the Commission was careful to state, at the beginning of its Report: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."[8] The Time article, however, does not say that. The article says that the Commission Report "stands as a grave indictment, since its facts were carefully investigated." But the Report does not say that. The "carefully investigated" statement in Time adds weight to its quotation, substituting the words "says *Justice*" for the words of the Report, "• • • a complaint which alleged that ."

Time argues that the "innocent construction" rule re-

8. 5 U. S. Comm. of Civil Rights Report 5 (1961).

quires this court to read the article "innocently," citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N. E. 2d 105, 108 (1962). We are required by the rule in that case to give the Time article its "natural and obvious meaning." To read the article innocently, Time asks us to read the article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things, assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done these things.

The complaint states a claim upon which relief can be granted. The District Court erred in ordering it dismissed.

The court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court, a verdict and judgment was recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied.

The judgment is REVERSED, and the cause REMANDED for further proceedings.

SCHNACKENBERG, *Circuit Judge*, dissenting:

The foregoing opinion's importance lies in its alarming invasion of the right of the press to publish its interpretation of the factual situation presented in an official report issued by a commission created by the Congress of the United States. 42 U. S. C. A. § 1975.

From the Commission's report entitled "Justice," it is clear that the Commission had a basis for the statements which it made in its report.[1] It referred, at page 105, to "a comprehensive review of available evidence," while, at page 5, it disclaimed making any conclusive determination

1. Said act required the filing of a report. See § 1975c(b).

as to whether the complaints or the police officers were correct in their statements, this being "a function of a court." But it expressly stated that "allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eyewitnesses, or by *staff*[2] fields investigations." That case not having come to trial in court at that time, the Commission, for convenience, expressly quoted the charges of the Monroe complaint as set forth by Mr. Justice Frankfurter in his dissent, 365 U. S. 167, at 203-204.

Justice dealt with numerous other cases where police brutality charges had been made, discussed violence by others than police, considered state and local remedies and the status and rights of the American Indian.

At 112, Justice made recommendations to Congress as to the advisability of remedial legislation. The report was duly transmitted to Congress.

The report known as Justice was privileged and nonactionable in a libel suit. A published article which fairly comments upon a governmental report is likewise privileged and nonactionable, under Illinois law. The publication in the case at bar is a fair comment upon the issuance of a governmental report and its contents. Plaintiff cannot force publishers, under threat of libel, to conceal the fact that the Commission pointed to his alleged conduct as a basis for its conclusions and recommendations to Congress.

I would affirm.

---

2. Italics supplied for emphasis. § 1975d (a) provided that there should be a full-time *staff* director for the Commission.

APPENDIX "C".

Second Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant*,

vs.

TIME, INCORPORATED, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1965

Before DUFFY and SWYGERT, *Circuit Judges*, and GRUBB, *Senior District Judge*.

DUFFY, *Circuit Judge*. Plaintiff Pape brought this suit seeking damages for libel. Jurisdiction was based upon diversity of citizenship. The complaint alleged the defendant, Time, Incorporated, publisher of the national weekly news magazine "Time", had defamed plaintiff in its November 24, 1961 issue. The allegedly libelous story reported the issuance and summarized the contents of the United States Civil Rights Commission's 1961 annual report. This Report entitled "Justice" is in book form. Chapter 2 is devoted largely to a description of alleged police brutality to Negroes.

The Time article entitled "Civil Rights—Dawdling on the Corner", was based largely on Chapter 2 of the Com-

mission's Report entitled "Patterns of Police Brutality." Time reported an incident which it claimed had occurred in Chicago involving brutality by Pape and other police officers while arresting members of a Negro family named Monroe.

In the District Court, defendant moved to dismiss—in effect, urging the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion. On appeal, this Court reversed. *Pape* v. *Time, Incorporated*, 318 F. 2d 652. We stated that the subordinate, vital question was whether Time's story of the Commission's Report of the Pape incident was fair comment.

In our opinion, we pointed out that the question then before us was not what the Commission's Report had said about Pape, but rather, what Time's article had said about the Report. We then noted that Time's article told the reader that the Report stated that Pape and others had actually committed certain acts. In fact, the Report had merely said that these acts were allegations in Monroe's complaint.

We stated "Under Illinois law, governing here, Time can be liable if it goes beyond that limit [fair comment] and states as a fact that which is not true. . . ."

We then said "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission report."

We decided that the complaint stated a claim upon which relief could be granted, and we reversed and remanded for further proceedings.

Subsequent to remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Thereafter, defendant took Pape's pretrial deposition. Pape testified he had been in the Chicago police department since 1933 and was presently a captain of police. He admitted that he and police officers under his command had gone to the Monroe house on the evening in question. At that time, he was a deputy chief of detectives for Chicago. He had been appointed to that position by the Commissioner of Police. His permanent rank at that time was lieutenant of police.

In *New York Times*, the Supreme Court stated (376 U. S. p. 283) "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable."

Footnote 23 referred to, stated in part—"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . ." It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official. . . ."

Plaintiff urges that the Supreme Court thus confined its holding in *New York Times* to an "elected" public official. Also, that plaintiff was not a "public official" within the meaning of that case because he had neither been elected to his office, nor appointed nor confirmed in his appointment by an elective body.

We do not read *New York Times* v. *Sullivan* as being limited to an elected public official. The Supreme Court based its decision, at least in part, upon certain precedents

involving appointed officials. In one of the cited cases, the libel plaintiff was a Deputy Superintendent of Police for the city of Detroit. *Lawrence* v. *Fox*, 357 Mich. 134, 97 N. W. 2d 719. In another of the cited cases, the plaintiff was the Chief of Police of Los Angeles—*Snively* v. *Record Publishing Company*, 185 Cal. 565, 198 P. 1.

Subsequent decisions to *New York Times* clearly indicate the courts do not understand the rule announced in that case to be confined to elected public officials. In *Henry* v. *Collins*, 380 U. S. 356 (1965), the Supreme Court applied the *New York Times* doctrine to the Chief of Police of Clarksdale, Mississippi. The Chief was an appointed officer.

In *Tucker* v. *Kilgore*, 388 S. W. 2d 112 (Ky. 1965), the Court applied the *New York Times* doctrine to an ordinary police patrolman in the city of Louisville, Kentucky. See also *State* v. *Browne*, 206 A. 2d 591 (N. J. 1965) and *Matassa* v. *Bel*, 164 So. 2d 332 (La. 1964).

We hold that on the date Pape arrested James Monroe, when Pape held the position of deputy chief of detectives and lieutenant of police, he was a public official as that designation was used in *New York Times* v. *Sullivan*.

We turn, therefore, to consider whether the existence of "actual malice" by Time, Incorporated presented a jury question. The Supreme Court in *New York Times* v. *Sullivan*, stated at 376 U. S. 279-280: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."

The record before us shows that Time, Incorporated was, at least, negligent in printing as established facts, matters and events which the Commission's Report stated were

mere allegations in a complaint. But, negligence is not enough.

In *New York Times*, the newspaper admitted it had had evidence in its own files affirmatively showing the falseness of numerous statements in the publication . . . 376 U. S. at pages 287-288; also that the Times had accepted and published the advertisement without in any way checking its accuracy against outside sources or material in its files. 376 U. S. 287.

The Supreme Court further said—376 U. S. at pages 287-288—"We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

In *Garrison* v. *Louisiana*, 379 U. S. 64, the Supreme Court applied the *New York Times* rule to criminal libel, holding that actual malice must be proved to convict an individual for libeling a public officer. The Court there defined malice as "only those false statements made with the high degree of awareness of their probable falsity. . . ." 379 U. S. 74.

The burden of proving actual malice is upon Pape. He admitted in his pretrial deposition that he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate attempt to harm him. He argues, however, that this question is already settled by reason of our decision in *Pape* v. *Time, Incorporated* (1962), 318 F. 2d 652.

Our previous decision was made prior to *New York Times* v. *Sullivan*. There, the District Court had dismissed the complaint on the defendant's motion so that all the well-pleaded facts stood admitted before us. We applied Illinois law.

We must now determine whether there is sufficient show-

ing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.

As stated in our previous decision—". . . Time took the risk when it reworded parts of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.*"

We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment.

The judgment of the District Court is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX "D".

Third Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

vs.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 15, 1969.

Before DUFFY, *Senior Circuit Judge*, KILEY and KERNER, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* This is a suit for libel brought by plaintiff, a Chicago police officer, against Time, Incorporated, the publisher of Time Magazine. The claim of plaintiff is based upon a story printed in Time Magazine under date of November 24, 1961. This appeal is from an order of the District Court granting, at the close of all of the evidence, a directed verdict in favor of defendant.

Pape became a policeman in March 1933. He was promoted to the position of Deputy Chief of Detectives in 1957. He held this position on October 27, 1958. He was promoted to Captain in 1959. During the period Pape was a sergeant of police, he participated in hundreds of arrests. On November 24, 1961, plaintiff, while on leave of

absence from his police position, was employed as Director of Security for the Chicago Thoroughbred Enterprises, Inc., which company operates several race tracks in the Chicago area.

"Justice", Volume 5 of the official 1961 Report of the United States Commission on Civil Rights, was issued on November 17, 1961. The Report stated: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."

Under the heading of "Search, seizure, and violence: Chicago, 1958," the Commission's Report stated that ". . . on the basis of a complaint which alleged that: . . ." It thereafter related an alleged occurrence on the part of detective Pape and twelve other police officers during which it claimed that Monroe and members of his family were abused and Monroe was arrested and questioned about a recently committed murder.

This is the third time this case has been before us. In *Pape* v. *Time, Incorporated,* 318 F. 2d 652, 655 (7 Cir., 1963) we reversed the judgment and remanded the case for further proceedings. In that opinion we stated: "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far, . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report."

After the remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). Thereafter, this case came before us for a second time. Our opinion in that case appears in *Pape* v. *Time, Incorporated,* 354 F. 2d 558 (7 Cir., 1965) (second opinion). We again reversed the judgment of the District

Court and remanded. We held that Pape was a public official as that designation was used in *New York Times Co.* v. *Sullivan, supra.* There is no reason to now reverse that holding. We recognized the doctrine "[T]hat prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. * * *" *Pape* v. *Time, Incorporated, supra,* at page 560.

In the second opinion at 354 F. 2d 560, we quoted from our first opinion as follows: "It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow (sic) officers *did* what the Commission Report merely said the Monroe complaint *alleged they did'.*" We again reversed the judgment of the District Court and remanded.

The Supreme Court has handed down several opinions explaining the language of the *New York Times Co.* v. *Sullivan, supra,* case. Among the cases which we have carefully considered is *Garrison* v. *Louisiana,* 379 U. S. 64, 74 (1964). The Court there held that recklessness requires a showing of a high degree of awareness of probable falsity. In *Henry* v. *Collins,* 380 U. S. 356, 357 (1965), the Court emphasized its interpretation of an "intent to inflict harm through falsehood." *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81, 84 (1967) and *St. Amant* v. *Thompson,* 390 U. S. 727, 731 (1968).

In our second opinion we stated at 354 F. 2d 560 "Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit." Since that time, the author of the Time article, one Edward F. Magnuson, has so testified. He admits that *when he wrote the article* he

knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon a complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word "complaint" and of the word "alleged." However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit.

We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written, the Pape-Monroe incident was reported in "Justice" as allegations in a complaint, not as proven fact. And the alleged injury to Pape was in Time's stating that the Commission reported that incident as true, instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an "intent to inflict harm through falsehood." *Garrison* v. *Louisiana*, 389 U. S. 64, 74 (1964); *Henry* v. *Collins*, 380 U. S. 356, 357 (1965).

We think pertinent the recent statement of the Court of Appeals for the Second Circuit in *Goldwater* v. *Ginzberg*, 414 F. 2d 324, 337 (2 Cir., 1969): "One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context."

We hold the District Court was again in error in granting defendant's motion for a directed verdict.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

KILEY, *Circuit Judge*, concurring.

I concur in Judge Duffy's opinion that this case should have gone to the jury.

It is my view that the testimony of Magnuson, referred to in Judge Duffy's opinion, was sufficient prima facie to prove that Time published the article in suit "with knowledge that it was false." The publication of the article with the words in the Commission report deliberately omitted could reasonably be found to be a publication of "a defamatory falsehood . . . with knowledge that it was false." This met the test of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital element of "actual malice." I agreed that the case progeny of *New York Times Co.* v. *Sullivan* has not changed the Supreme Court's test.

The effect of doing to the Commission report what Time did to it was to give the report an additional reader value. The Time article does not contain the various qualifications in the Commission report which Time urges upon us now with respect to the context in which the Commission treated the Monroe-Pape incident. We must consider the Time article as it was published.

APPENDIX "E".

UNITED STATES COURT OF APPEALS.
For the District of Columbia Circuit.

No. 23,267

JACK WASSERMAN, *Appellant*

vs.

TIME, INC.

Appeal from the United States District Court
for the District of Columbia

Decided March 3, 1970

Before FAHY, *Senior Circuit Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

PER CURIAM: On cross motions in appellant's action for libel in the District Court against appellee Time, Inc., the court granted summary judgment in favor of Time, and dismissed appellant's complaint. He appeals.

Time publishes a weekly magazine with national circulation. In its issue of October 7, 1966, it published a photograph of seven men sitting at a table in a restaurant in Queens, New York. One of the men was appellant, a mem-

ber of the bar of this court in active practice. Another was Frank Ragano, also an attorney. Accompanying the photograph was a brief article which referred to the occasion as a meeting even "bigger than Apalachin' of top Cosa Nostra hoodlums." The article also referred to the occasion as a delayed lunch which had been interrupted by the police because the District Attorney wanted the men before a grand jury on crime in Queens, that a judge had set bail at $100,000 each, that this had been met, and that the grand jury got only grunts.

Ragano sued Time for libel in the United States District Court for the Middle District of Florida.[1] In that case Time moved for summary judgment on the basis of the freedom of press protected by the First Amendment. Judge Krentzman denied the motion. He held that if the statement was understood as defamatory it was not protected by the ruling announced in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), if the statement was false and made with actual malice, that is, with knowledge of its falsity or in reckless disregard of whether it was true or false. He held as to Mr. Ragano that under these criteria the publication was with actual malice. He accordingly denied Time's motion for summary judgment and held that it was for the jury to determine whether or not the article was in fact understood as defamatory.

We accept the position of Time, as Judge Krentzman did, that the standards of *New York Times* v. *Sullivan*, *supra*, are applicable even though appellant was not a public official, since he was engaged in a matter of public interest and concern.[2] However, as more fully appears in the opinion of Judge Krentzman, it is undisputed that Time knew that Wasserman, like Ragano, was an attorney for one or more

1. *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005 (M. D. Fla. 1969), *appeal docketed*, 5th Cir. 1969.

2. *See* cases cited in *Ragano*, *supra*, 302 F. Supp. at 1006-07, n. 1.

of the men in the group referred to in the article and was not one of those called before the grand jury and released on $100,000 bail. Time's position is that by attending the delayed lunch meeting the attorneys were playing a part and were engaging in a demonstration defiant of the law, which justified Time in its editorial decision reached in good faith not to refer to appellant and Ragano as attorneys, but to place them in the same category as the others characterized in the article as we have set forth. Such a decision on the part of the editors of Time, however, would not preclude responsibility for any defamation known to be false or made with reckless disregard of the truth.

The judgment is reversed and the case is remanded for trial on the issues of actual malice, defamation and possible damages.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

WRIGHT, *Circuit Judge, concurring:* I concur in the court's opinion. My attempt here is to set out what I conceive to be the proper procedure in handling the issue of actual malice in *New York Times Co.* v. *Sullivan*[1] cases.

In my judgment *New York Times Co.* v. *Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth.[2] *Cf. Jackson* v. *Denno*, 378 U. S. 368 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant. *Washington Post Co.* v. *Keogh*, 125 U. S.

1. 376 U. S. 254 (1964)

2. *Compare Rosenblatt* v. *Baer*, 383 U. S. 75, 88 (1966): "We remark only that, as is the case with questions of privilege generally [in a libel case], it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'"

App. D. C. 32, 365 F. 2d 965 (1966), *cert. denied*, 385 U. S. 1011 (1967). *Compare Goldwater* v. *Ginzburg*, 2 Cir., 414 F. 2d 324, 336-337 (1969), *cert. denied*, ... U. S. ....., 38 U. S. L. WEEK 3279 (January 26, 1970).

If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity."[3] In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with "convincing clarity."

This two-step procedure in which both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern. As the Court stated in *Rosenblatt* v. *Baer* in support of its requirement that the trial judge in the first instance determine whether the evidence shows the plaintiff in a libel suit to be a public official: "Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 525; *New York Times*, 376 U. S., at 285." 383 U. S. at 88 n. 15.

I am authorized to say that Judge Robinson concurs in this opinion.

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3. *New York Times Co.* v. *Sullivan*, *supra* Note 1, 376 U. S. at 285-286.

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No. 109

In the

Supreme Court of the United States

October Term, 1969

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1309

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The brief of the Petitioner correctly sets forth the citations of the various opinions below, except that it fails to note that certiorari was denied the second opinion of the United States Court of Appeals for the Seventh Circuit by the Supreme Court of the United States in 384 U.S. 909.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief of the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First, Fourth, Fifth, Seventh, Ninth and Fourteenth Amendments to the United States Constitution. They provide as follows:

> "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof, or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I.

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affidavit, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. IV."

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amend. VII.

"The enumeration in the Constitution of certain rights shall not be construed to deny, or disparage others retained by the people." U.S. Const., Amend. IX.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, Sec. 1.

QUESTION PRESENTED

The question presented is whether, in a libel action, after viewing all of the evidence in the light most favorable to the plaintiff, and after drawing all reasonable inferences therefrom in favor of the plaintiff, there was any evidence upon which a fairminded jury could find the defendant, Time, Inc., in publishing its falsehood, guilty of malice; that is, knowledge that its story was false, or reckless disregard of whether its story was true or false.

STATEMENT OF THE CASE

This is a suit for libel brought by plaintiff, a Chicago police officer, against Time Incorporated, the publisher of Time Magazine. The claim of the plaintiff is based upon a story printed in Time Magazine under date of November 24, 1961. This is an appeal from an order of the District Court granting at the close of all of the evidence a directed verdict in favor of defendant.

Plaintiff, Pape, became a policeman in March 1933. He worked as a detective with the State's Attorney's Office of

Cook County, Illinois, from 1933 through 1937. In 1939 he was transferred to the Detective Bureau of the Chicago Police Department, and thereafter was assigned to the robbery detail, where he worked until 1959. In 1942 he was promoted to sergeant. He was promoted to lieutenant in 1952. (A. 30) During the period Pape was a sergeant of police he participated in hundreds of arrests. (A. 170). Plaintiff was promoted to Deputy Chief of Detectives in 1957 and held that position for two years. He was promoted to Captain in 1959. On November 24, 1961 Plaintiff, while on leave of absence from his police position, was employed as Director of Security for Chicago Thoroughbred Enterprises, Inc., which company operates several race tracks in the Chicago area.

On November 17, 1961 the Annual Report of the United States Commission on Civil Rights was issued and published (A. 220). Throughout the Report the Commission makes it clear that it was dealing with allegations, complaints, litigation and not facts. In its Introduction the Report states:

> "The Commission has been disturbed by persistent reports of unconstitutional and violent acts of some agents of justice in the United States.
>
> "After an extensive review of these allegations and the entire field of administration of justice, the Commission authorized a study of these problems. . . ." (A. 327)

The chapter of the Commission's Report relevant hereto begins with the Statement:

> "In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality." (A. 328)

The Report went on to caution:

"In no case has the Commission determined conclusively whether the complainants or the officers are correct in their statements. That is the function of a court." (A. 328)

The Commission's Report went on to recite eleven incidents. Insofar as ten of these were concerned the Commission identified the officers involved only by initials. The remaining incident reported by the Commission concerned the plaintiff, Pape, and appeared on pages 20 and 21 of its Report, as follows: (A. 329)

"Search, Seizure and Violence: Chicago, 1958—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although its decisions did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that:

"'. . . On October 29, 1958, at 5:45 a.m., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the livingroom; that the officers roused the six Monroe children and herded them into the livingroom; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated

about a murder and exhibited in line-ups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.'"

On November 24, 1961 Time, Inc. published its magazine with nationwide circulation of 2,700,000 (A. 17), containing the following article:

"Dawdling on the Corner

"The new paperback book has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission.

"The bluntly frank report tells of a police officer referred to only as 'Y', in Dawson, Ga., who arrested Negro James Brazier for speeding in November 1957. It quotes Brazier: 'When I first entered the door of the jail "Y" hit me on the back and the head and knocked me down and said, "You smart son-of-bitch. I been wanting to get my hands on you for a long time." I said, "Why you want me for?" "Y" said, "You is a nigger who is buying new cars and we can't hardly live. I'll get you yet."' When Brazier was arrested again five months later by the same officer, Brazier's wife related, '"Y" then said, "I told you I would get you." James said, "What do you want to hurt me for? I ain't done nothing. I got a heap of little chillun." "Y" said, "I don't give a goddam how

many children you got, you're going away from here."' 'Y' pulled out his pistol and stuck it against James' stomach."

"Beaten to Death. Continues the report: 'Brazier's ten-year-old son pleaded with the officers to stop beating his father and was knocked to the ground by "Y"; the victim was thrown onto the floor of the police car with his legs dangling outside. "Y" kicked him twice in the groin, slammed the door on his legs, threw a hat full of sand into his bloody face, and drove off.' Brazier died five days later, and 'Y' was never punished.

"Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by thirteen police officers, ostensibly investigating a murder. The police, says *Justice*, 'broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy." Another officer pushed Mrs. Monroe. Other officers hit nd kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothes from closets to the floor, dumping drawers, ripping mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

Thereafter, the plaintiff, Frank Pape, filed this action against Time, Incorporated, founded on libel, alleging the aforesaid Time article was false in that it reported the Commission *said* Pape had done the aforesaid things, when, in fact, the Commission was only reporting allega-

tions of a complaint. Time filed a motion to strike the complaint filed by Pape, which motion was granted by the District Court.

On April 25, 1963, in the case of *Frank Pape* v. *Time, Inc.* (1963, C.A. 7, Illinois), 318 F. 2d 652, the Circuit Court of Appeals rendered its decision reversing the District Court. The Circuit Court of Appeals there held that "Time took the risk when it re-worded parts of the Commission's Report that it might go too far", and further held that a jury could find that Time went beyond the limits of fairness and in so doing was not protected by its privilege of fair comment. The Circuit Court of Appeals further found that "a jury could read the Time article as stating that the Report said that Pape and his fellow officers *did* what the Commission Report merely said the Monroe complaint *alleged they did*." (Emphasis supplied)

Thereafter this Court, in the case of *New York Times* v. *Sullivan*, 376 U.S. 254, rendered its decision, holding that in a libel action by a public official there must be a showing that the false statement was made with malice; that is, knowledge of its falsity or reckless disregard of whether it was true or false.

On remandment of this cause an answer was filed by Time. The deposition of Pape was taken and the District Court granted a motion for summary judgment, relying on the case of *New York Times* v. *Sullivan, supra.* A second time the case was appealed to the Circuit Court of Appeals. On the second appeal in *Frank Pape* v. *Time,* (1965 C. A. 7th, Illinois), 354 F.2d 558, the Circuit Court of Appeals held the defendant, Pape, a public official within the meaning of *New York Times* v. *Sullivan, supra,* and considered whether or not in the record before it the motion for summary judgment revealed facts sufficient to

show the statement made by Time, Inc. was made with "actual malice"—that is, with knowledge that it was false or reckless disregard of whether it was false or not. In this regard the Court said:

> "We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.
>
> "As stated in our previous decision '. . . Time took the risk when it re-worded parts of the Commission's Report that it might go too far . . .' We noted Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (381 F.2d, at page 655), 'it is our opinion that a jury could read the Time article as stating that the Report *said* Pape and his follow (sic) officers did what the Commission Report merely said the Monroe complaint alleged they did.'
>
> "We hold that a sufficient showing has been made so that a jury could find Time, Inc. acted with reckless disregard as to whether or not re-worded statements hereinbefore described were true or false. Therefore, it was error for the District Court to grant defendant's motion for summary judgment."

Certiorari was denied this decision by the Supreme Court of the United States in 384 U.S. 909.

On the second remandment this cause proceeded to trial before a jury. Eight eye-witnesses were produced, including the plaintiff, Pape, each of whom testified as to the incident set forth in the Commission's Report and

the Time article. Generally, each of these witnesses denied those acts set forth as facts in the Time article and as allegations of a complaint in the Commission Report. In addition, on the trial of the cause there was presented the testimony of Edward F. Magnuson, the author of the Time article.

Magnuson, a former police reporter for the Minneapolis Tribune, testified that he had three documents to which he referred when he wrote the Time article (A. 173). These documents consisted of the Commission's Report, heretofore set forth, a news release from the Commission accompanying its Report, Exhibit G, which in no way mentions the plaintiff, Pape (A. 177), and a New York Times story, Exhibit H, which in no way mentions plaintiff, Pape (A. 177). Magnuson found no reference to Plaintiff Pape in the Commission Report, other than as heretofore quoted (A. 177). Magnuson also testified that in addition to the aforesaid, the only other investigation he made was to inquire whether Pape had been punished, Plaintiff Pape's first name, and the location of the apartment where the incident occurred (A. 178). As far as writing the article is concerned, the author testified as follows (A. 176-177)

> "Q. Would you describe, sir, what deletions you made between the matter you read in the government publication and the matter which you read in the Time article?
>
> "A. Well, we have deleted only in the quotable parts here the section of that paragraph which is within quotes. The only changes in that section have been to change the word 'that' in the *Justice* document to 'the' in order to break up this long, long sentence. We have changed the semicolon to periods, again in the interests of clarity. Then we did not continue the whole quote, which goes on to what

happened after Monroe was arrested and brought to the police station.

"Q. You also, sir, omitted that part of the article that is in *Justice,* which reads, 'On the basis of a complaint which alleged that . . .'

"A. That's right."

Magnuson further testified that he knew he was reporting as fact what the Commission only reported as allegations in a complaint. Magnuson testified as follows (A. 207-209):

"Q. . . . I will read it for you. I am reading after the words 'Searches, seizures, violence, Chicago', 'The Supreme Court of the United States decided the case of Monroe v. Pape on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that', you did read that?

"A. I certainly did, right. . . .

"Q. You did state you are a former police reporter?

"A. That's right.

"Q. You understand the word 'complaint'?

"A. That's right.

"Q. You understand the word 'alleged'?

"A. That's right.

"Q. Therefore, while you did not find the word 'allege' in the running head, 'Searches, seizures and violence, Chicago, 1958', you did find it in the body, is that right?

"A. I did, sir, right.

"Q. You found the word 'complaint'?

"A. That's right.

"Q. Well, I will read it again, sir, it says '. . . on the basis of a complaint which alleged' . . . Mr. Reuben asked you a moment ago to tell us what you

thought, so suppose you now tell me what you think. What did you think when you read' . . . on the basis of a complaint which alleged . . .' ? Tell us what that means to you.

"A. That means to me the Commission in this case is reporting this incident in terms of a claim being made in a Court by the Monroes, but you can't stop there . . .

"Q. There is more here than just an allegation or a complaint.

"A. In the context of this report there is more than just an allegation involved here, that is right.

"Q. You did not understand this as simply the complaint of James Monroe as filed in a court suit.

"A. I knew they were citing the complaint of James Monroe.

"Q. However, you understood that there was more to it than just that.

"A. That's right."

Mr. Magnuson admitted that by the Time article he was not trying to say the Commission was reporting allegations of a complaint. Magnuson further testified the changes which he made in his article from the Commission Report did not make it clear to readers that these were allegations of a complaint. (A. 215)

Testimony was also presented on the trial of this case by one Karen Booth, editorial researcher for Time Magazine, who was the researcher on the Time article which is the subject matter of this action. (A. 219) As a part of her job she read the Commission Report and checked the Time story against the report (A. 220). In checking the article against the Commission Report she found that the author did not use the full statement set forth in the Commission Report in his story in Time Magazine (A. 223). Reference to "complaint" and "allegations" had

been left out. As to whether or not she called such omissions to the attention of the author, Researcher Booth stated that she did not believe that to be her function. According to her, the writer had chosen, in conjunction with the editor, which materials they were going to use from the particular quotation (A. 224). It was not her function to determine whether the whole statement would be used (A. 224). The researcher also testified that she called for all the material on Monroe and Pape in Time's "morgue" file (A. 220-221). She examined the "morgue" but the only attempt to call this "morgue" to the attention of the author was a conversation wherein Mrs. Booth told the author that there was quite a bit of material on Capt. Pape and the Monroes in the library and other newspapers had published reports of the incident (A. 205).

Researcher Booth concluded her testimony by stating that she felt the Commission Report was factually accurate since it was an official U. S. body. (A. 231). She made no comment on the factual accuracy of the Time story.

At the close of the plaintiff's case the defendant moved for a directed verdict, which motion was denied. At the close of all the evidence the defendant again moved for a directed verdict, which motion was allowed.

Plaintiff thereupon appealed for the third time to the Circuit Court of Appeals. On such appeal, in *Pape* v. *Time, Inc.*, 419 F.2d 980, the Circuit Court of Appeals once again reversed the judgment of the District Court and remanded the cause for trial.

In this third opinion the Circuit Court of Appeals said:

> "In our second opinion we stated, at 354 F.2d, 560, 'Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit.' Since that

time the author of the Time article, one Edward F. Magnuson, has so testified. He admits that when he wrote the article he knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon a complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word 'complaint' and of the word 'alleged.' However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and the action of Pape and the other police officers was based on allegation in a complaint in a pending suit.

"We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written the Pape-Monroe incident was reported in *Justice* as allegations in a complaint, not as proven fact, and the alleged injury to Pape was in Time's stating that the Commission reported the incident as true instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an 'intent to inflict harm through falsehood.' (Citations)

"We think pertinent the recent statements of the Court of Appeals for the Second Circuit in *Goldwater* v. *Ginsberg,* 414 F.2d 32, 327 (2nd Cir. 1969): 'One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context.'"

In a concurring opinion Judge Kiley of the Circuit Court of Appeals stated:

"It is my view that the testimony of Magnuson referred to in Judge Duffy's opinion was sufficient

prima facie to prove that Time published the article in suit with knowledge that it was false. The publication of the article with the words in the Commission Report deliberately omitted could reasonably be found to be a publication of 'a defamatory falsehood . . . with knowledge that it was false.' This met the test of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital element of 'malice' . . ."

SUMMARY OF ARGUMENT

In the instant case of libel this court is called upon to maintain the delicate balance between the right of an individual to his privacy guaranteed by the Fourth, Fifth, and Ninth Amendments to the United States Constitution and the right of a publication to free speech and press guaranteed by the First Amendment to the Constitution.

This court in *New York Times* v. *Sullivan* has required that in a libel action a public official must show that the Defendant was guilty of actual malice, that is the Defendant published its story with knowledge of its falsity or with reckless disregard of whether its story was true or false. The instant case comes to this court on a motion for directed verdict and under such circumstances the court must determine whether or not there is any evidence from which a fair-minded jury could determine that the Defendant, Time Magazine, was guilty of malice. The evidence must be looked at in the light most favorable to the Plaintiff, giving to the Plaintiff all reasonable inferences and intendments.

In the instant case, Time's article was particularly scurrilous reporting that a high level commission found the Plaintiff police officer guilty of a heinous crime in the

course of his employment. Time admitted that this high level commission merely reported that a "Complaint" had been filed which "alleged" such heinous crimes but chose to omit the words "alleged" and "complaint" and translate the Commission's Report into findings of fact. Time Magazine took such action without the simplest investigation. This is evidence from which a fair-minded jury could find Time guilty of malice—the knowing or reckless disregard of the truth.

The Circuit Court of Appeals below recognizes that a sufficient showing had been made of malice to permit this case to go to the jury and said court should be affirmed.

ARGUMENT

I.

In this Defamation Action the Courts Must Maintain the Delicate Balance between Time Magazine's Right to Free Expression and Policeman Pape's Right to Protection of his own Reputation from Unjust Invasion and Wrongful Hurt

In the area of libel and slander two precious rights guaranteed by our Constitution collide—the right of privacy, emanating from the Fourth, Fifth and Ninth Amendments to the United States Constitution. (*Time* v. *Hill*, 385 U.S. 374, at pages 412-413) and the freedom of speech and press, emanating from the First Amendment. Each of these rights is delicate and vulnerable, and one should not be permitted to devour the other. All things should be done to encourage free comment but the press is only free if it is responsible.

Certainly, as was said in *New York Times* v. *Sullivan*, 376 U.S. 254, at 270, there is a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. This does not mean, however, that in the arena of the printed word all other freedoms must fall. The remarks of Warren and Brandeis in their famous article on "The Right of Privacy" are as poignant today as the day they were written (4 Har. L. Rev. 193, at 196, 1890):

> "Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no

doubt. The press is over-stepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. . . ."

The problem of balancing the individual's right of privacy and freedom of the press is particularly acute today with the great expansion of the communications media. All kinds of ordinary citizens find themselves from time to time thrust into the public limelight through radio, television, newspapers and magazines. Time Magazine would maintain that everyone whom it writes about is a public official, public figure or person involved in matters of public interest and concern. The only protection for the right of privacy of the individual is through the laws

of slander and libel. Through such laws the Courts have the responsibility of maintaining the delicate balance between free expression and the right of a man to be let alone.

II.

Defendant, Time, Inc., When it Departed from Fidelity in its Article, Went too Far and was Guilty of Actual Malice—that is, It Disseminated Its Story with Knowledge of Falsity or with Reckless Disregard of Whether its Story was True or False.

With a background of this Court's decisions over the years, nurturing the individual's right to privacy and freedom of press (*Time* v. *Hill*, 385 U.S. 374, at pages 412-415), in 1964 this Court rendered its decisions in *New York Times Company* v. *Sullivan*, 376 U.S. 254. This case involved a libel action by the elected Commissioner of Public Affairs of the City of Montgomery, Alabama, under whose charge was the Police Department. The libelous article was an advertisement which, unlike the libel in the instant case, did not refer to the official directly by name. The statements in the advertisement upon which plaintiff, Sullivan, principally relied as referring to him, were that "truck loads of police . . . ringed the Alabama State College campus after a demonstration on the State Capitol steps and that Dr. Martin Luther King had been arrested . . . seven times." These statements were false in that although the police had been "deployed near the campus," they had not actually "ringed" it and had not gone there in connection with a State Capitol demonstration, and in that Dr. King had been arrested only four times. This Court in that case established the following rule (pages 279-280):

> "The constitutional guarantees required, we think, a federal rule that prohibits a public official from re-

> covering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

This Court, in *New York Times* v. *Sullivan, supra,* went on to examine the record to determine whether malice existed. The Court in *New York Times* found malice lacking because the matters set forth in the advertisement were substantially true and any admissions of minor discrepancies were after the fact (page 286), because the advertisement constituted an attack on government and not on the plaintiff (page 290), because there was no reference to the plaintiff in the advertisement either by name or official position (page 288), because The New York Times was excused from an independent investigation, since it had a right to rely on the knowledge of the good reputation of the sponsors of the advertisement, and because the mere presence of contrary stories in the files of the Times did not establish that the Times knew the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication of the advertisement (page 287).

Other than enunciating the aforesaid quoted proposition, the Supreme Court in *New York Times* v. *Sullivan* did not lay down guide lines as to what evidence constitutes a showing of actual malice. The Court preferred to leave this to the individual cases.

In the instant case the Court below subscribed to, recognized and applied the principles set down in *New York Times* v. *Sullivan*. The Court below stated:

". . . we recognize the doctrine 'that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."'"

The question, therefore, presented herein becomes what is evidence of malice sufficient to permit this cause to go to the jury.

A. The scurrilous nature of Time's defamatory words and the circumstances surrounding its publication are evidence of malice.

In the case of *Ashton* v. *Commonwealth,* 405 S.W.2d, 562, the Supreme Court of Kentucky had occasion to comment on the *New York Times* rule. At page 569 that Court said:

"It is argued that there was no evidence offered to show the defendant's defamatory statements were made with 'actual malice.' That is what *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 95 A.L. R.2d, 1412, 11 L. Ed. 2d 686, and *Garrison* v. *State of Louisiana,* 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 125, apparently require. However, neither of those cases required independent proof of malice. Obviously, unless the defendant had told someone of an evil motive, or had voluntarily taken the stand and so testified, actual malice could be proved only as a state of mind made manifest by the nature of the defamatory words and the circumstances surrounding their publication. *New York Times* and *Garrison* do require the establishment of actual malice, (i.e., a calculated falsehood) by proof rather than presumption, but they lay down no constitutional standard with respect to the sufficiency of the proof (although *New York Times* considered the question of sufficiency)."

The Court in the *Ashton* case went on to say that malice may be proved by circumstantial evidence as any other fact or from permissible inferences which may reasonably be drawn from the defendant's conduct.

The scurrilous nature of the publication itself is evidence of malice. The Supreme Court of the United States in both *New York Times* v. *Sullivan* (*supra*) and *Rosenblatt* v. *Baer* (383 U.S. 75, 15 L. Ed. 2d 597, 86 S. Ct. 669), looked at the articles in question themselves to determine malice. In each of the instances the articles did not mention the plaintiff directly or by name. In each of the cases the Supreme Court interpreted such articles as generally attacks on government rather than attacks on individuals, and thereby found wanting any malice. Here, however, the article is not a general attack on the government of the City of Chicago. The article mentions the plaintiff by name directly, accusing him of striking a Negro and directing abusive language to such Negro. It is especially offensive because no other person is mentioned by name and other persons accused of police brutality are referred to only by initials.

The case of *Gilligan* v. *King*, 264 N.Y.S. 2d 309, 48 Misc. 2d 212, presented to the Supreme Court of New York an incident where the plaintiff, a police lieutenant, shot a 15-year-old Negro boy. Thereafter a poster was circulated by the defendant with the plaintiff's name and picture on it and the legend over the picture "Wanted for Murder." The case came to the Court on motion to strike. The Court held, assuming that the plaintiff was a public official, the issue of actual malice should be determined at a trial. The Court said, at pages 314-315:

> "It has been held that actual malice may be inferred from the language and tenor of the libelous

statement or the extent or excessiveness of the publication thereof. (Citations)

"Plaintiff charges that these posters were circulated and published while an official investigation of the incident was being conducted by the Police Review Board and the Grand Jury. The posters themselves, their design and construction, the placing of the words complained of above the picture of the plaintiff in uniform—these are all subjects for factual interpretations on the issues of actual malice and fair comment." (Citations)

The Supreme Court of Illinois in the case of *Coursey* v. *Greater Niles Township Public Corporation,* 40 Ill. 2d 257, reviewed an article wherein the plaintiff, a police officer, was accused of following a young girl and making immoral suggestions to her. The Court said, at page 266:

"The amended complaint did considerably more than repeat the epithet of 'actual malice'. As previously noted, it charged that 'the defendants and each of them, intending to injure the plaintiff's good name and injure him in his livelihood, with knowledge that it was false, and with reckless disregard to whether it was false or not maliciously composed, published and caused to be published in their said newspaper, an article containing false, scandalous and malicious libel concerning the plaintiff.' *It also incorporated by reference the article in question, which on its face gives rise to factual inferences tending to support the charge of actual malice.*" (Emphasis supplied)

The impact of the article itself as evidence on the question of malice was put in its proper evidentiary position in the case of *Tucker* v. *Kilgore,* 388 S.W. 2d 112. The Supreme Court of Kentucky in discussing the *New York Times* rule said at page 114:

"The significance of the defense of qualified or conditional privilege is that it removes the conclusive presumption of malice otherwise attaching to words that are actionable *per se* and thereby casts on the plaintiff a technical burden of proof in that respect. (Citations) *This does not require any greater degree of proof by the plaintiff because the offensive character of the words still is sufficient by itself to support an inference of malice.* The practical difference, therefore, is that in one case the instructions do not require a finding of malice as a condition of recovery and in the other they do." (Emphasis supplied)

What is the nature of the article in the instant case? It was not a paid advertisement sponsored by persons well-known in public affairs. It was not a general attack on Government. It named the plaintiff, specifically charging him with heinous crimes in the course of his duties. The article said:

"The new paperback has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text of police brutality in both the South and the North and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission. . .

". . . the police, says *Justice,* 'broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' . . ."

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This article was disseminated to Time's 2,700,000 subscribers. The article was no different than the "wanted for murder" poster in the *Gilligan* case (*supra*) or the finding of immoral conduct in the *Coursey* case (*supra*). Time's reporting of a finding of a criminal act, if false, on its face produces an inference of malice.

B. The admission of Times' author that he knowingly translated the Commission's Report of allegations into findings of fact constitutes knowledge that his story was false and is evidence of malice.

The record in this case clearly indicates that the author of the defendant's article knew that what he was writing was false. In spite of this, Time contends that, by its mere protestations of good faith, it is entitled to the protection of the First Amendment. Such is not the law. In the case of *Garrison* v. *Louisiana*, 379 U.S. 64, at page 75, this Court held:

> "The use of calculated falsehood, however, would put a different cast on the constitutional question . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' (citations). Hence the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection."

The case of *Skain* v. *Weldon*, 422 S.W.2d 271, involved the reversal by the Supreme Court of Missouri of a jury

verdict for the defendant because of faulty instructions. The Court also reviewed the record and determined that there was a sufficient showing of malice. This was an action by City Councilmen against newspaper and television companies. The defendant companies were opposed to the granting by said City Council of a television franchise to another competing company. The defendant company ran an editorial defamatory as to all Councilmen not particularly named. Plaintiff was not particularly named and the remarks were false as to him. In the *Skain* case, after reviewing *New York Times* v. *Sullivan* (*supra*), the Court stated, at page 275:

> ". . . it does not appear, however, that the Supreme Court's concept of malice differs from what 'malice' has always meant in this jurisdiction; 'what the plaintiff had to show to prove expressed malice was that the publication, insofar as it was privileged, was not made in good faith to give a fair and impartial account of the charges, trial and result, which were matters of public concern and about which it was privileged to inform the public, but it was done with a wrong motive. That is what malice is, the presence of an improper motive . . .' Proof of falsity of facts and knowledge of such falsity is proof of actual malice. (*Cook* v. *Pulitzer*, 241 Mo. 326, 145 S.W. 480), because that does unquestionably show a wrong motive. Therefore, if the defendant has added material facts on its own authority which it knew to be false, it would thereby go outside of its privilege and malice would be inferred. It is likewise a wrong motive which would tend to show malice to state something is the truth without knowing whether it is true, recklessly and without any reasonable attempt to find out about it or with complete disregard of other known facts.'"

The case of *Fox* v. *Kahn,* 221 A. 2d 181, concerned a speech made by the defendant at a public gathering where he stated that there was a murder in town and the District Attorney picked up a young weak-minded fellow and got a confession out of him; that the District Attorney put this fellow in a room by himself and beat a confession out of him with a telephone book. The charges were repeated in a letter to a local newspaper. On the trial the defendant denied uttering the words but admitted he knew that, at the time the words were allegedly spoken, the plaintiff did not administer the alleged beating, nor order it to be done. The Court upheld a jury verdict for the plaintiff. At page 183 the Court said:

> "Whereas here, knowledge of falsity is not only proved but admitted, actual malice is proved and it is unnecessary to prove that defendant uttered the words with reckless disregard of whether the statement was or was not false."

In *Spahn* v. *Julian Messner, Inc.,* 233 N.E. 2d, 840, the Supreme Court of New York upheld a libel judgment in favor of the baseball player, Warren Spahn, applying the *New York Times* test. At page 842 the Court states:

> "An examination of the undisputed findings of fact below as well as the defendant's own admission that 'in writing this biography the author used the literary techniques of invented dialogue, imaginary incidents and attributed thoughts and feelings' . . . clearly indicates that the test of *New York Times* v. *Sullivan* (supra) and *Time, Inc.* v. *Hill* (supra) has been met here.
>
> "The trial judge found gross error of fact and 'all pervasive distortions, inaccuracies, invented di-

> alogue and the narration of happenings out of context' (citations). These findings were unanimously affirmed by the appellate division. The Court wrote 'it is conceded that use was made of imaginary incidents, manufactured dialogue and a manipulated chronology. In short, defendant made no effort and had no intention to follow the facts concerning plaintiff's life except in broad outline and to the extent that the facts readily supplied a dramatic portrayal, attractive to the juvenile reader. This liberty . . . was exercised with respect to the plaintiff's childhood, his relationship with his father, the courtship of his wife, important events during their marriage and his military experience.' (Citations)
>
> "Exactly how it may be argued that the 'all pervasive' use of imaginary incidents—incidents which the author knew did not take place—invented dialogue—dialogue which the author knew had never occurred—and attributed thoughts and feelings which were likewise a fragment of the author's imagination—can be said not to constitute knowing falsity, is not made clear by the defendant. Indeed, the arguments made here are in essence not a denial of knowing falsity but a justification for it."

In Carpenter's Work entitled *Defamation under the First Amendment—The Actual Malice Test and the Public Official,* 46 N. C. L. Review, 392 (1968), the author reviews what constitutes malice. At pages 396 it is stated:

> "The fact that the story was based on a written report from which information was inaccurately reported, strongly suggests the existence of actual knowledge."

The case of *Varnish* v. *Best Medium Publishing Co.*, 405 F. 2d 608 (1968), involved the reporting of a suicide and murder by plaintiff's wife. Plaintiff attacked the

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article because it employed "a happy wife and mother" theme, which was false. There was a suicide note available to the author when the story was written, which said:

> "Just a note and explanation to let you know that I am going to put the three children and myself to sleep forever. I see no future for the children or myself. Mitch (plaintiff) is impossible and this is the only way to get away from him. I've had a miserable life since the time I met him. Tell Uncle Chris and Uncle Butch I'm sorry about the money they each loaned me in 1961 . . . I owe so much I'll never have to bother anyone anymore."

In his article the author said:

> ". . . police found a note left by Mrs. Varnish for her mother. It said: 'Just a note in explanation to let you know I am going to put the three children and myself to sleep forever. I can't go on.'"
>
> "It was an explanation that explained nothing, least of all to the shocked Varnish."

The Court on review required malice and upheld the jury verdict. At page 612 the Court said:

> "Evidence of recklessness consists largely of the author's testimony on cross-examination that he had no basis except his own 'presumption' for labeling Mrs. Varnish a happy wife and mother. Both the suicide note and the police report which the author had in his possession indicated that the Varnishes did not have a happy home life. Likewise, the manner in which the suicide note was used by the author could be taken as evidence of intent or recklessness. Therefore, the jury was entitled to find that the article was published with knowledge that it was false or in reckless disregard for the truth."

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Recently the Circuit Court of Appeals for the Second Circuit rendered its decision in the case of *Goldwater v. Ginsburg*, 414 F.2d 324 (1969). This case was concerned with an article in "Fact" Magazine, which article maintained that Senator Barry Goldwater was psychologically unfit to be President. There, as in the instant case, the defendant sought to escape malice by contending that he relied on other sources in setting forth his story. The Court upheld a denial of motion for summary judgment and of a motion for directed verdict and jury verdict. At page 337 the Court said:

> "Citation of sources for most of the statements about Senator Goldwater in Part I of the 'Goldwater issue' and the accurate reprinting in Part II of most of the original responses of psychiatrists to the Fact questionnaire, does not, as appellants appear to claim, insulate appellants from responsibility for any of the false statements they made. Reliance upon newspaper articles, books and campaign literature and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual malice when he caused the full material to be published. Repetition of another's words does not release one of the responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of the report. (Citations) Furthermore, in our case, Ginsburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the report of another if the latter's statements or observations are altered or taken out of context. Also,

if Ginsburg's 'melding' and 'distillation' of letters results in misplaced emphasis or exaggeration, or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his misstatements.

"Viewing the submitted material and the inferences which might be drawn from them 'in the light most favorable to the party opposing the motion' (Citations), the district court properly concluded that a trier of fact should have the opportunity to decide whether appellants were liable to appellee."

In the instant case, as in the *Varnish* case and the *Goldwater* case, we are dealing with a magazine report of another writing. Therefore, the manner in which this writing was used by Time's author could be taken as evidence of intent or recklessness. Furthermore, in the instant case Time's author omitted portions of the writing, quoting portions of statements out of context in order to support his predetermined result. He cannot fairly argue his good faith or avoid liability by claiming that he is relying on the report of this high government Commission if the latter's statements or observations are altered or taken out of context. Also, if this author's omissions and distillation resulted in misplaced emphasis or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his misstatements. The writing, being reported, said that a "complaint" had been filed "alleging" certain crimes. The author read this and understood this, but he chose to omit and distill the Commission's words in order to say that the Commission found plaintiff guilty of the crimes. This action is more than misplaced emphasis or distortion. It is the propagation of a known falsity. Time cannot maintain that the misstatements in its new product are not its misstatements.

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The author in this record admits that he knew and understood that the Commission was reporting mere allegations (A. 207-208). He further admitted that he omitted all reference to a complaint and allegations from the words of the Commission Report when he wrote his story (A. 176-177). Knowing and understanding what the Commission said and choosing to omit a portion of such words, changing the meaning of what was said from allegations to a finding of fact, constitutes a known falsity.

The author admits that he was trying to say by the article something more than a report of allegations in a complaint (A. 209). The author was trying to say "that the report said Pape and his fellow officers did what the Commission Report merely said the Monroe complaint alleged they did." (*Pape* v. *Time, Inc.*, 354 F. 2d 558, at page 560). This was his predetermined purpose and he altered what the Commission said accordingly.

The Circuit Court of Appeals below, in its third decision, recognized such action on the part of Time's author as malice. (*Pape* v. *Time, Inc.*, 419 F.2d, 980). There the Court said:

> "In our second opinion we stated at 354 F. 2d 560, 'Time's writer who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit.' Since that time the author of the Time article, one Edward F. Magnuson, has so testified. He admits that when he wrote the article he knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word 'complaint' and of the word 'alleged.' However, Magnuson deliberately and know-

ingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending suit.

"We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely a deliberate act of omission can show malice, as well as an act of commission. Time omitted mention of the fact that when the article was written, the Pape-Monroe incident was reported in 'Justice' as allegations in a complaint, not as a proven fact, and the alleged injury to Pape was in Time's stating that the Commission reported that incident as true, instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an 'intent to inflict harm through falsehood.' *Garrison* v. *Louisiana,* 389 U.S. 64, 74 (1964); *Henry* v. *Collins,* 380 U.S. 356, 567 (1965)."

In his concurring opinion in the Court below, Judge Kiley specifically held that the action of the author heretofore analyzed constituted known falsity. It is there said:

"It is my view that the testimony of Magnuson referred to in Judge Duffy's opinion was sufficient prima facie that Time published the article in suit 'with knowledge that it was false.' Publication of the article with the words of the Commission's Report deliberately omitted could reasonably be found to be a publication of 'a defamatory falsehood . . . with knowledge that it was false.' This met the test of *New York Times* v. *Sullivan* (citation) under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital elements of 'actual malice.'"

In his testimony and in the brief to this Court the author and Time Magazine attempt to justify their false

reporting by references to headnotes in the Commission Report and the statement in the Report as follows (A. 328):

> "In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality. They are presented in the belief they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in this study."

However, like the *Spahn* case (supra), "the arguments made here are in essence not a denial of knowing falsity but a justification for it."

Nor does reference to headnotes in the Commission's Report or the above-quoted language or other portions of the Report bear out Time's attempted justification. The Commission's Report is cautious and circumspect throughout. Even in the above-quoted language relied on by Time, the Commission refers to 'alleged facts.' It cautions that in no case has the Commission determined conclusively the truth of the allegations, for that is the function of the court. It says that some cases are supported by criminal conviction and others by investigation, but it nowhere says that all are so supported. It actually says the opposite. In its introduction the Commission talks merely of allegations. It employs the use of initials instead of names. It recommends legislation

which would aid and encourage persons filing civil rights complaints. The only logical reason for the Commission to include in its report the Monroe-Pape complaint was as an example to support this recommendation for legislation. It was not in *"Justice"* to report that Pape and his fellow officers did the heinous acts as Time falsely stated.

A case particularly similar to the instant case is the recent District Court decision in *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005 (1965). In that case Time referred to an attorney as a member of the Cosa Nostra, knowing such individual was an attorney. There, like here, Time attempted to justify its falsehood on the ground that its author, although knowing what he was doing, honestly believed in the truth of that which he said. At page 1010 the District Court held:

> "As of this writing Time has moved successfully for summary judgment in five other libel cases brought throughout the country. This fact is quite significant in illustrating the plaintiff's burden in such cases. Perhaps in no other area of civil litigation is the burden so ominous as in the law of defamation. To survive summary judgment proceedings it is necessary that he offer some evidence upon which a jury could find convincing clarity of actual malice or reckless disregard. The decisions require that he come forward with evidence of the defendant's state of mind; in effect, he must prove a negative. There must be '* * * sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts.' The standards enunciated, however, were all set forth in cases where the defendant had no actual knowledge of falsity. Under those circumstances the publisher's position was supportable. The present case differs, however, because

> Time had actual knowledge of the fact that the plaintiff was an attorney, yet decided to disregard or omit this fact. The First Amendment does not require that the plaintiff show knowledge of falsity and then, as Time contends, bad faith in the publisher's choice of disregarding the truth. Where the plaintiffs presents evidence to show that the publisher chose to substitute his opinion for facts actually known by him in an article that is capable of a defamatory meaning he has come forward with sufficient evidence to show reckless disregard."

This Court, in the case of *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), at page 732, held that mere protestations of good faith are insufficient to obviate malice. The Court there said:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with the belief that the statements were true. The finder of fact must determine whether publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination or based wholly on a nonverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improper that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report."

The author of Time's article was reporting another writing. He read the other writing, knew what it said, but knowingly and deliberately chose to omit certain words, translating mere allegations in such writing to

findings of fact. Such constitutes sufficient evidence on the question of malice to permit the cause to go to the jury.

C. Time's total want of verification and investigation when information was easily available, and the unreasonableness of the libelous statements with their dire consequences, constitute evidence of reckless disregard of whether its story was false or not.

Curtis Publishing Company v. *Butts,* 388 U.S. 144, involved an article appearing in the Saturday Evening Post concerning the coach of the University of Georgia football team. This article accused Butts of fixing the football game between the University of Georgia and the University of Alabama. At the time of the article Butts, although coach for a State university, was employed by an independent private corporation. In the *Butts* case this Court extended the *New York Times* rule to "public figures" but upheld the jury verdict on the ground that malice had been shown. This Court equated malice to "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

So also this Court, in *St. Amant* v. *Thompson,* 390 U.S. 717 (1968), inquired into the manner of investigation to determine whether or not the story was published with reckless disregard.

In the case of *Spahn* v. *Julian Messner, Inc.,* 21 N.Y. 2d 124, 223 N.E.2d 840 (1967), the Court, at page 843, held that the mere reading of newspaper clippings was an insufficient investigation, and that reckless disregard existed.

The courts of Minnesota have been forerunners in the application of the malice test to actions for libel. In its

recent decision in *Mahnke* v. *Northwestern Publications, Inc.*, 280 Minn. 328, 160 N.W.2d (1968), the Supreme Court of Minnesota upheld a jury verdict in a libel action in favor of a plaintiff police captain. The article in question was entitled "Cop Rebuke in Tot Molesting Urged." The article reported an interview with a Catholic priest who had sent a mother to the police after she had reported to him that her husband was sexually molesting their six-year-old daughter. Though the priest was not at the police station at the time of the incident, the article reported him as stating that the plaintiff police captain had refused to arrest the father, that when the matter was called to the police captain's attention he flew into a rage and accused the mother of trying to get even with her husband. The article also reported that the priest said the police captain told the mother there is no case and refused to send out detectives. All of these things were false. At page 337 the Supreme Court of Minnesota said:

> "Under the Supreme Court rule enunciated in the *New York Times* case a person is culpable of actual malice if he makes a false statement against a public official with 'reckless disregard' of whether it is false or not. It may be said that precisely what constitutes reckless disregard is an open question, since it must depend upon the facts and circumstances of each particular case. Undoubtedly further litigation concerning the application of this standard may well be expected in the future."

At page 341 the Court further stated:

> "The article was placed on the front page of a newspaper with a title sufficiently catchy so that it might cause persons merely glancing at the article to believe that the plaintiff might have been involved in the molesting of a child. The location of the article demonstrates that it was given top importance and

Schwartz (reporter) admitted that he knew the subject was serious. Defendant's executive director admitted that readers of the story would be indignant and think that something should be done about it. Thus, it appeared to us that the gravity of the charges in this story was a factor to be considered by a jury in assessing the conduct of the defendant."

In passing on the evidence sufficient to show reckless disregard the court particularly considered the fact that the reporter did not talk to the plaintiff or anyone who was present when the occurrence took place, but rather based its story on hearsay (page 343). At page 343 the Supreme Court of Minnesota held:

"Under the standards applied by the United States Supreme Court in the *New York Times* case for the protection of freedom of the press under the First Amendment, neither proof that a statement is false nor that it is negligently written is sufficient to establish actionable libel against the defendant. In order for the plaintiff to recover it is essential that he show 'actual malice' on the part of the defendant in the publication of the article by reckless disregard of whether the statements therein were false or not. We think the jury on the record presented here could find defendant's publication to have been made with such disregard. Several factors permitted this conclusion. Under all of the circumstances the story was needlessly false. The statements relating to the plaintiff could have been checked out by a reporter in a matter of hours and the false statements eliminated in a follow-up story in the next edition. The only purpose in publishing Father McGuire's version of the story six days old without verification of the plaintiff or others present at the meeting — and in placing it on the front page — was to attract the interest of the reading public. The story was given the most controversial view possible in the face of

the warning that had been given by Chief Einslow that in fact the matter was based entirely upon a misunderstanding. The jury certainly could find that if the defendant were concerned about the truth of this article, it would under the circumstances have required additional supervision and checking before releasing the article for publication. Instead, routine treatment was given the story being developed by a few telephone calls despite its unusual nature and no reporters were assigned to check out the facts. Defendant's executive editor acknowledged that it would have been preferable to have the reporter talk to a person who was at the meeting. Schwartz admitted, however, that he would have published the story in the early edition without any verification but for the action of the city editor in holding it up. Under the circumstances the evidence of the falsity contained in the article is also evidence of recklessness."

Finally, after reviewing the instruction given to the jury, the Minnesota Supreme Court, at page 351, stated:

"The Court and the memorandum accompanying the order denying the defendant's post trial motion point out that the *New York Times* case laid down no guidelines as to what constitutes a reckless disregard except that mere negligence is insufficient and said that what amounts to reckless disregard is clearly a jury question (citations). We agree that this was a jury question. Moreover, we find the instructions given to the jury placed squarely before it the law set forth in the *New York Times* and *Butts* cases. It is the established rule in this state that a motion for judgment notwithstanding the verdict accepts the view of the evidence most favorable to the verdict and admits every reasonable inference to be drawn from such evidence as well as the credibility of the testimony of the adverse party. And if the application of this rule in the light of the evidence as a whole discloses a reasonable basis for the verdict, the motions must

be denied (citations). Here, since there was evidence which did support a finding that the defendant was guilty of reckless disregard of whether the article was false or not, and the verdict was arrived at under instructions clearly stating the applicable law, the trial court could not have properly granted defendant's motion."

In the light of the aforesaid cases the instant record discloses sufficient evidence of "reckless disregard" as to require the case to be submitted to the jury.

The Time article in the instant case begins with a catchy title: "Dawdling on the Corner." A like catchy title "Cop Rebuke in Tot Molesting Urged" was found evidence of reckless disregard in *Mahnke* v. *Northwestern Publications, Inc. (supra)*.

The introductory remarks of the instant Times story conditioned the reader to serious charges. In its introduction the article states:

"The new paperback book has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the United States Commission on Civil Rights first created by Congress in 1967. *Justice* carries a chilling text about police brutality in both the South and the North — and it stands as a grave indictment since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprised the Commission."

The defendant here, therefore, cannot deny that it was aware of the gravity of what was to follow and the probable consequences to anyone falsely accused therein.

Our Time story then goes on to falsely state that the Commission found plaintiff guilty of assault and battery, vituperation and police brutality. The story concludes

"the officers were not punished . . .", a phrase calculated to produce indignation on the part of the reader. Thus, here, as in the *Mahnke* case, "the gravity of the charges in this story was a factor to be considered by a jury in assessing the conduct of the defendant."

Time has a circulation of over two and one-half million readers weekly, which readers are located throughout the country and the world. Whether or not malice exists depends to a great extent on the persons to whom the libelous statement is made. To disseminate falsehoods to such a far-flung audience is evidence of reckless disregard.

Full knowledge of the harm which a falsehood may likely produce to the defendant is evidence of reckless disregard and was so considered by Chief Justice Warren in his concurring opinion in *Curtis* v. *Butts,* 388 U.S. 144, at pages 169 and 170. One's duty to investigate a statement which would have a foreseeably disastrous effect on persons libeled is much greater than the duty to investigate a statement which would have relatively minor foreseeable consequences. In the instant case the plaintiff was a police officer whose responsibility it was to enforce the law. The article accused him of police brutality and racism in the course of his employment. The article came during an era when race relations are an important segment of police activity. Under such circumstances falsehoods disseminated by the defendant could have no other result than to destroy plaintiff's effectiveness in this important segment of police work. The dire consequences to the plaintiff of this falsehood are obvious.

As a matter of fact the record discloses that the plaintiff, who had spent almost his entire career in investigating activities prior to the Time article (A-30), was relegated to the traffic division in which he had no experience after

the libelous article. (A-94). Defendant, Time Magazine, when it published its article, recognized the seriousness of its charges and knew of the disastrous effect it would have on the plaintiff.

The instant Time story was in no sense hot news. The author was not confronted with an immediate deadline.

On the question of investigation of the truth or falsity of the matters set forth in the instant Time story, there was presented the testimony of the author, Magnuson, and the researcher, Booth. All the author looked to for his investigation were the Commission Report, a press release which did not mention plaintiff, and a New York Times story which did not mention plaintiff. This constituted no investigation at all. The author cannot rely on the investigation of the Commission for what he said, since that investigation only revealed that a complaint had been filed.

The story was submitted to the researcher, Booth, who besides reading it examined Time's "morgue" files. The researcher in no way called the various stories constituting Time's "morgue" to the attention of the author (A. 205). Therefore, the contents of such "morgue" stories in no way influenced the content of the article. In any case, similar research constituting nothing more than newspaper and magazine clippings, the authenticity of which have not been checked, was held insufficient in *Spahn* v. *Julian Messner, Inc. (supra)*. Even these clippings and suggested stories in the "morgue" files, insofar as they related to the Monroe-Pape incident, were only reporting allegations in a complaint or conversations with Monroe. None of them said, as Time said, that Pape did commit an assault on Monroe.

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Defendant, Time Magazine, is a large organization with bureaus and personnel in Washington, New York and Chicago. They have the facilities to verify anything they care to publish. In spite of such facilities easily available, the author of the instant Time story made no attempt to interview plaintiff, Pape, nor anyone having any knowledge of the incident it was reporting. The author of Time's story did not even have the benefit of any affidavit as existed in the *Butts* and *St. Amant* cases. No independent investigation of any kind was conducted by Time Magazine in the instant case. Such failure is evidence from which a jury could conclude that Time in publishing its falsehood was guilty of reckless disregard — malice.

III.

On a Motion For Directed Verdict the Court Must Decide Whether There Is Any Evidence from Which a Jury Could Find for the Plaintiff and in so doing, the Evidence Must be Taken in the Light most Favorable to the Plaintiff According to Him All Reasonable Intendments and Inferences Favorable to Him.

As has been said, this is an appeal from an order of the District Court directing a verdict against the Plaintiff in favor of the Defendant after the close of all the evidence.

The Federal Constitution guarantees all parties the right to a trial by jury, which right is one of the most sacred in our system. The jury is the recognized trier of fact. Questions of law are reserved to the court (*Magenow v. Aetna Freight Lines*, 79 S. Ct. 1184, 360 U.S. 273). Cases should not lightly be taken from the jury for to do so is to abridge this sacred right. It is only where the evidence is all one-sided or so overwhelmingly on one side as to leave no doubt of what the fact is, that the case or an

ssue becomes one of law for the court and the court is ustified in taking the case from a jury. An issue of fact s for the court only when the minds of reasonable men ould not differ.

In the trial of a case before a jury in the Federal Court, it is the general rule that the functions of the judge and jury are governed and controlled by Federal rules and decisions and not by State rules and decisions. (35B Corpus Juris Secundum, Section 958, P. 324). The Federal rule on motions for directed verdict is stated by the United States Supreme Court in the case of *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. In this malpractice action the Supreme Court upheld the denial of a motion for directed verdict. At page 94, the Court said:

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' (Citations)

"Issues that depend on credibility of witnesses, and the effect or weight of the evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such fact there should be drawn in favor of the latter all the inferences that fairly are deducible from them (Citations). Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. (Citations)."

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The test is not whether the evidence brings conviction to the mind of the trial judge *(Deere* v. *Southern Pacific Co.*, 123 F. 2d 438). Nor is it the same test which prevails on a motion for a new trial. As was stated in *Macarages* v. *Raymond Concrete Pile Company*, 220 F. 2d 889, at page 891:

> ". . . A Motion for directed verdict must be based on the complete absence of any evidence to warrant submission to the jury; whereas a motion for new trial concededly may be granted because the trial court concludes that the verdict is merely against 'the greater weight of the evidence.' "

The reason for a different test on a directed verdict than on a motion for new trial is succinctly stated in 35B C.J.S. Section 979, Pg. 353, where it is stated:

> "Generally speaking it is desirable not to direct a verdict at the close of the evidence but to reserve decision on any motion therefor and allow the jury to bring in a verdict; and the trial judge may then, under the rule, set aside the verdict as against the weight of the evidence and grant the motion. The reason this procedure is desirable is that the reviewing court on appeal may, if it disagrees with the trial judge, reinstate the verdict and unnecessary retrials may be avoided when the trial court erroneously rules on a motion for a directed verdict."

Evidence may be considered regardless of who produced it at the trial. It is to be considered in the light most favorable to the non-moving party *(Higaski* v. *Shefflett*, 195 F. 2d 784). In passing on whether there is sufficient evidence to submit an issue to the jury, the Reviewing Court should look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given

(*Wilkerson* v. *McCarthy*, 336 U. S. 53, 57, 93 L. Ed. 497, 502).

An issue in the instant case is malice or state of mind. It has been uniformly held that questions of good faith, motive, intent and the like, if at all doubtful, are ordinarily questions to be determined by the trier of facts (*Woodward* v. *U. S.*, 208 F. 2d 893 at Pg. 899; *National Labor Relations Board* v. *Brown & Root, Inc.*, 203 F. 2d 139 at Pg. 147). This rule is particularly applicable where, as here, proof is largely in the hands of the Defendant. The instant case also involves a meaning of a writing and it has been uniformly held that doubt of what a writing means is for the jury (*William* v. *Alver*, 252 F. 2d 895; *The U. S. For the use of Dixie Plumbing & Supply Co.* v. *Taylor*, 293 F. 2d 717; *Washington Post Co.* v. *Chaloner*, 250 U. S. 290, 395 S. Ct. 448, 63 L. Ed. 987).

A reading of the opinion of the District Court clearly indicates that such court reached its conclusion to direct a verdict, disregarding the rules of law applicable on a directed verdict. In such opinion the court itself admits that it had lingering doubts as to the propriety of directing the verdict at the close of the Plaintiff's case, but states that such doubts disappeared at the conclusion of the entire case. If the evidence most favorable to the Plaintiff created any doubt in the mind of the court under the rules governing a directed verdict, the court should have allowed the case to go to the jury.

In its opinion in support of its order directing a verdict, the District Court only looked at the evidence most favorable to the Defendant. The District Court even had difficulty admitting the falsity of the Time story when a mere reading of the Time story and the Commission Re-

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port, which it was quoting, shows that the Time story was false. As a matter of fact the evidence most favorable to the Plaintiff (as well as all the competent evidence) shows that the Time story not only falsely reported what the Commission said but also falsely reported what actually happened. Eight eye witnesses testified to the actual events forming a basis for the magazine article and the Commission Report. There can be no question that a fair-minded jury under the rules applicable to a directed verdict could find the Time story false.

In its opinion the District Court considers only so much of the testimony of the witnesses of Time magazine as it feels is most favorable to such Defendant. It ignores the testimony of the author from which a fair-minded jury might infer knowing falsity. The author states that he omitted the part of the Commission Report which read "on the basis of the Complaint which alleged that." The author admitted that he read such words in the report and as a former police reporter he understood the meaning of the words "complaint" and "allegation". He stated that by his article he was not trying to tell the readers that all he was reporting were allegations of a complaint. He states that he was trying to say in such article that these were more than allegations. From such testimony a fair-minded jury could infer that the author knowingly published a falsehood and such is malice under the definitions laid down by the Supreme Court of the United States.

The District Court gave no consideration to the Time story itself. This story directly stated that an important commission of the United States government found Plaintiff guilty of a crime, assault and battery, and of calling a person "nigger" and "black boy" in the course of his professional activities. Plaintiff was mentioned by name

whereas others in the article were mentioned only by initials. Such an article on its face gives rise to a factual inference tending to support the charge of actual malice (*Coursey* v. *Greater Niles Twp. Pub. Corp.*, 40 Ill. 2d 257 at page 266; *Tucker* v. *Kilgore*, 1964 Ky. 288 S.W. 2d 112). Under such circumstance the case should have been left to the jury.

The District Court justified its abandonment of the rule governing motions for directed verdict on the grounds that to allow the case to go to the jury would have a "chilling effect" on the exercise of press freedom. The Supreme Court in *Time* v. *Sullivan*, 376 U. S. 254, might have established the rule, requiring malice in libel actions against public officials, to alleviate the "chilling effect" of libel actions on press freedom but it did change the rule that a verdict shall not be directed where there is any evidence to support it. For the District Court to so act is not only sacrificing the right of privacy but also the right to trial by jury on the altar of press freedom.

CONCLUSION

The trial court should not have directed a verdict if there was any evidence from which a fair-minded jury could conclude that the Defendant, Time Magazine, in publishing the falsehood acted with actual malice — that is, with knowledge of the falsity of its story or with reckless disregard of whether its story was true or false. In determining whether there was any such evidence all matters should have been looked at in the light most favorable to the Plaintiff. The Time article produced an inference from which a fair-minded jury could find actual malice.

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In addition, the admission of the author that he read the Commission Report, understood its contents, and knowingly left a portion of the Report out, thereby translating mere allegations in the Commission's Report into findings of fact, constituted evidence from which a fair-minded jury could conclude that Time knowingly disseminated a falsehood and was guilty of malice. So also the total lack of investigation on the part of Time, Inc. before publishing its falsehood is evidence from which a fair-minded jury could reasonably conclude that the Defendant was motivated by actual malice. It was, therefore, error for the District Court to direct a verdict and the Circuit Court of Appeals for the Seventh Circuit properly reversed and remanded.

For the reasons heretofore set forth, Plaintiff prays the decision of the Seventh Circuit be affirmed.

Respectfully submitted,

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No. 109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

TIME, INCORPORATED,

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vs.

FRANK PAPE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

We respectfully submit that Pape's brief fails to advance any persuasive reasons or relevant authorities in support of the judgment of the Seventh Circuit.

I. PAPE'S CONFUSION OF THE RIGHT OF PRIVACY AND PUBLIC OFFICIAL LIBEL SUITS.

Pape argues that the right of privacy is as important, if not more so, than First Amendment rights of free public discussion and debate. (Pape's Br. pp. 15, 17-19.) Citing Warren and Brandeis' classic 1890 article, *The Right of Privacy* (4 Harv. L. Rev. 193), Pape argues that too many "ordinary citizens" find themselves "thrust into the public

limelight" by the news media and that their only protection is through the laws of slander and libel.[1] (*Id.* at pp. 18-19.)

The fallacy of Pape's right of privacy argument is twofold:

> *First:* Pape is a public official suing for libel (not invasion of privacy) and must prove that Time is guilty of actual malice under the *New York Times* doctrine. Any reliance by Pape upon the privacy rights of "ordinary citizens" is merely a disguised claim that he is not in fact a public official within the meaning of *New York Times* (as he repeatedly and unsuccessfully argued throughout the lower court proceedings).
>
> *Second:* Even if Pape were an ordinary citizen and this were a suit for invasion of privacy, his constitutional burden would be the same—to prove that Time published with actual malice within the meaning of *New York Times*. The decision of this Court in *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), held the *New York Times* standard of actual malice applicable to suits for invasion of privacy when the subject of the publication is a matter of public concern. (385 U. S. at 388-89.)

We submit that Pape's strained argument concerning the "right of privacy" is in reality a confession that he cannot defend or support with any authority the Seventh Circuit's marked departure from *New York Times* and its progeny.

---

1. Warren and Brandeis did not contend that protection of the right of privacy is through the laws of slander and libel. They urged that the courts recognize an entirely new tort, *i.e.*, the unwarranted invasion of privacy, to provide redress in cases where common law concepts of defamation did not do so. See Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

II. PAPE HAS CITED NO CASES THAT SUPPORT HIS POSITION.

None of the cases cited in Pape's brief hold or imply that a submissible jury question of *New York Times* actual malice is established by evidence comparable to that adduced at the trial below:

Ashton v. *Commonwealth*, 405 S. W. 2d 562 (Ky. 1965). This decision of the Kentucky Court of Appeals, cited and discussed in Pape's brief at pp. 21-22, was reversed by this Court in *Ashton* v. *Kentucky*, 384 U. S. 195 (1966). The case involved a prosecution for criminal libel; this Court held the Kentucky criminal libel statute unconstitutional.

Gilligan v. *King*, 48 Misc. 2d 212, 264 N. Y. S. 2d 309 (1965) (Pape's Br. pp. 22-23). The only issue decided by the New York Supreme Court was whether the complaint stated a cause of action in light of *New York Times*. In marked contrast to the *Time* article here, the alleged libel in *Gilligan* was a poster reproducing a picture of the plaintiff, a police officer, and the false words "Wanted For Murder" above it.

Coursey v. *Greater Niles Township Pub. Corp.*, 40 Ill. 2d 257, 239 N. E. 2d 837 (1968) (Pape's Br. p. 23). As in the *Gilligan* case, *supra*, the only issue decided by the court was whether the complaint sufficiently pleaded that the alleged libel was published with actual malice. The plaintiff, a village police patrolman, claimed libel from an article stating that he had been found guilty of making immoral suggestions to a teenage girl.

Tucker v. *Kilgore*, 388 S. W. 2d 112 (Ky. 1964) (Pape's Br. pp. 23-24). The Kentucky Court of Appeals held in this case that the plaintiff, a Louisville

policeman, was not required to prove actual malice under *New York Times*, and that the alleged libel was not qualifiedly privileged.[2]

Skain v. *Weldon*, 422 S. W. 2d 271 (Mo. 1967) (Pape's Br. pp. 25-26). The Missouri Supreme Court, in reversing a judgment for the defendant publisher because of improper jury instructions, stated that actual malice is equivalent to "*a wrong motive . . . the presence of an improper motive.*" (422 S. W. 2d at 275; emphasis in original.) This Court rejected such a concept in *Henry* v. *Collins*, 380 U. S. 356, 357 (1965), holding that motive, or "intent to inflict harm" does not constitute actual malice under *New York Times*; there must be "intent to inflict harm through falsehood."

Fox v. *Kahn*, 421 Pa. 563, 221 A. 2d 181 (1966) (Pape's Br. p. 27). The alleged libel here was that the plaintiff, a District Attorney, had placed an accused person in a room alone and beat a confession out of him with a telephone book. At the trial, the defendant squarely admitted that he *knew* the plaintiff did not administer the alleged beating nor order it to be done. The Supreme Court of Pennsylvania held that actual malice had been proven because of the defendant's flat admission of subjective knowledge of falsity.

Spahn v. *Julian Messner, Inc.*, 21 N. Y. 2d 124, 233 N. E. 2d 840 (1967) (Pape's Br. pp. 27-28). This was a suit for invasion of privacy brought by baseball pitching star Warren Spahn on the basis of a fictionalized biography. The biography contained gross errors of fact, "all-pervasive distortions, inaccuracies, in-

2. The *Tucker* case was decided shortly after this Court's decision in the *New York Times* case. The defendant in *Tucker* did not seek review of the decision by this Court.

vented dialogue and the narration of happenings out of context." (233 N. E. 2d at 842.)

Varnish v. *Best Medium Pub. Co.*, 405 F. 2d 608 (2nd Cir. 1968) (Pape's Br. pp. 28-29). This was another invasion of privacy action. The plaintiff's wife had killed their three children and committed suicide; the article in question was a sensationalized version of the tragedy in the weekly tabloid, *National Enquirer*. As in the *Fox* case, *supra*, the author admitted that he deliberately falsified the story.

Goldwater v. *Ginzburg*, 414 F. 2d 324 (2nd Cir. 1969) (Pape's Br. pp. 30-31). Senator Barry M. Goldwater in this action recovered $75,000 in punitive damages against Ralph Ginzburg and Fact Magazine for two poisonous articles published during the 1964 election campaign; Ginzburg's articles repeatedly called Goldwater a "paranoid" and compared him to Hitler. Ginzburg had purported to conduct a "poll" of psychiatrists by mail but the results were deliberately slanted and colored by omissions and distortions. Moreover, reputable psychiatrists and psychiatric associations wrote to Ginzburg during the poll denying its validity.

The Second Circuit in affirming the judgment against Ginzburg found sufficient evidence of actual malice in Ginzburg's "predetermined and preconceived plan to malign the Senator's character" through falsehood. (414 F. 2d at 337.) There is no such evidence in the case at bar; the approach and attitude of the author and researcher of the *Time* article were in total contrast to Ginzburg's. Moreover, the *Time* article was written concerning the official annual report of the U. S. Commission on Civil Rights; the report recommended remedial civil rights legislation to the Presi-

dent and Congress on the basis of enumerated episodes of nationwide police brutality.

Mahnke v. *Northwest Publications, Inc.*, 280 Minn. 328, 160 N. W. 2d 1 (1968) (Pape's Br. pp. 38-41). The defendant newspaper printed an article reporting the false and unverified statements of a priest to the effect that the plaintiff, a Minneapolis police detective, had refused to arrest a man that had sexually molested his six year-old daughter. The story was given front page, banner headline treatment. Although six days elapsed between the event in question and publication of the article, the reporter did not contact the plaintiff to obtain his version; in fact, no effort whatsoever was made to check or corroborate the contents of the article prior to publication. Also, the plaintiff's demand for a retraction of the article was refused.[3]

In sum, none of Pape's cited authorities substantiate the judgment below. The decision of the Seventh Circuit, we submit, is totally insupportable and is in fact a throwback to pre-*New York Times* common law concepts of libel and presumption of malice without proof. We respectfully urge reversal.

---

3. Moreover, the correctness of the decision is questionable at best. While the decision may possibly be justified on the singular ground (not present in this case) that the defendant, as in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), had knowledge of facts indicating that the story was false, a more likely interpretation is—as the dissenting opinion pointed out—that the court erroneously found proof of recklessness from: (1) the nature of the defamatory article, contrary to the teachings of *New York Times*, 376 U. S. at p. 273, (2) failure to investigate, contrary to the teachings of *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967), and (3) failure to retract, contrary to the teachings of *New York Times*, 376 U. S. at p. 286.

III. PAPE'S BRIEF FAILS TO REFUTE PETITIONER'S ARGUMENTS AND AUTHORITIES.

Pape's brief does not attempt to distinguish any of the cases cited and discussed in our main brief. Most significantly, Pape fails to distinguish or even discuss the cases under *New York Times* that define the constitutional requirements of proof for submission of the issue of actual malice to the jury. *E.g., Wasserman* v. *Time, Inc.*, 424 F. 2d 920 (D. C. Cir. 1970); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969); *Washington Post Co.* v. *Keogh*, 365 F. 2d 965 (D. C. Cir. 1966) (Petitioner's Br. pp. 27-29). As we have shown, the cases have required that *all* evidence pertaining to the defendant's editorial process and methodology be considered and that no single or isolated factor be given overriding dominance (Petitioner's Br. pp. 24-30). When the defendant's editorial process is fully disclosed to the court prior to trial and there is no evidence to prove actual malice with "convincing clarity," the courts have held that summary judgment should be granted to eliminate the "chilling effect" that expensive trials and large verdicts inevitably have upon First Amendment freedoms. *E.g., Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858 (5th Cir. 1970); *Konigsberg* v. *Time, Inc.*, 312 F. Supp. 848 (S. D. N. Y. 1970).

In the instant case, Time's editorial process in writing and researching the article was fully disclosed at the trial and direction of a verdict against the plaintiff was clearly the correct result. The trial court followed the procedure enunciated in *Wasserman* v. *Time, Inc.*, 424 F. 2d 920 (D. C. Cir. 1970) for cases that are not disposed of by summary judgment. *Wasserman* delineated a "two-step" procedure: First, at the close of the plaintiff's case, the trial court must decide whether actual malice has been shown with convincing clarity. Second, if the trial is permitted to

proceed, the court must again decide at the close of all the evidence whether actual malice has been proved with convincing clarity. If so, the issue may properly be submitted to the jury. In this two-step process, *both* the trial judge *and* the jury must independently find actual malice before there can be judgment for the plaintiff.

Cases holding that on the peculiar facts and evidence before the court *prior* to trial, the defendant was not entitled to summary judgment are not inconsistent with *Wasserman* or the decision of the trial judge below. *E.g.*, *Time, Inc.* v. *Ragano*, 427 F. 2d 219 (5th Cir. 1970) (cited in Pape's Br. p. 36). The Seventh Circuit's decision, however, is directly contrary to *Wasserman* and Pape does not contend otherwise. The decision should be reversed and the judgment of the trial court reinstated.

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No. 109

In the
Supreme Court of the United States
October Term, 1970

TIME, INCORPORATED,
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vs.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Now comes the Respondent-Plaintiff, Frank Pape, and respectfully prays that this Court grant a rehearing in the above-entitled cause because the Court misapprehended the following points in its opinion of February 24, 1971.

1. In its Opinion the Court states:

> ". . . and in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other,

> we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff" (Citations).

This Court thereupon goes through a lengthy review of the entire publication of the United States Civil Rights Commission entitled *Justice* and finally concludes;

> "To permit the malice issue to go to the jury because of the omission of a word like 'alleged' despite the context of that word in the Commission report and the external evidence of the report's overall meaning would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact."

In making its analysis and in justifying its conclusion this Court went beyond the record in this cause. Nowhere in this cause was the entire publication *Justice* admitted into evidence or offered into evidence by any party. The only parts of the publication *Justice* that are a part of the record below are Defendant's Exhibit E consisting of the cover, an introduction, a list of members of the Commission, an excerpt from the foreword, an excerpt from page 1, excerpt from page 5, two headings from page 6, heading from page 12, heading from page 18, the Monroe-Pape case on pages 20 and 21, and certain excerpts of Father Hessberg on pages 166 and 168.

This court obviously went to the document *Justice* itself, independent of the record, and based its conclusion aforesaid on portions of *Justice* never presented by anyone in the Court below. This Court on page 7 of its Opinion refers to many incidents included in *Justice*, which were clearly designed to shock, anger and alarm the reader, indeed move him into the position of support of spe-

cific recommendations of the Commission. Yet the only incident which was a part of the record in the Court below was the Monroe-Pape incident and nowhere were those portions of *Justice* made a part of the record which concerned the conclusions of the Commission. The Court quotes copiously from pages 1 and 3 of *Justice* which were not a part of the record below. The Court relies heavily in reaching its conclusion on an incident in *Justice* involving the killing of a Negro in Georgia and the killing of a Negro in Cleveland and quotes from page 11 of Justice, but neither of these incidents in *Justice* were a part of the record in this cause. It also quotes from the conclusions of the Commission at pages 109-112, but such pages of *Justice* were never made a part of this record.

Usually courts of review confine themselves to enunciating propositions of law and do not concern themselves with an analysis of facts. In the instant case this Court chose to abandon this usual and ordinary procedure and to review the evidence in the record. In so doing this Court should have stayed with the record and not sought out evidence not a part of the record. The question here presented to the Court is whether or not there was sufficient evidence from which a fairminded jury could find the Defendant guilty of malice. Evidence not presented to such jury cannot persuade a Court of review that the evidence below was insufficient.

This Court at page 10 of its Opinion states:

> "In the light of the totality of what was said in *Justice* we cannot agree that, when Time failed to state that the Commission in reporting the Monroe incident had technically confined itself to allegations of a complaint, Time engaged in a 'falsification' sufficient in itself to sustain a jury finding of 'actual malice'."

But neither this Court nor any court can consider a total book not offered in evidence.

Exclusive of head notes, covers, lists of members and the like, the only portions of *Justice* in the record are as follows:

> "The United States Commission on Civil Rights was created by the Civil Rights Act of 1957 as a bipartisan agency to study civil rights problems and report to the President and Congress. Originally created for a 2-year term, it issued its first comprehensive report on September 8, 1959.
>
> "On September 14, 1959, Congress extended the Commission's life for another 2 years. This is the fifth of five volumes of the Commission's second statutory report."

> "The Commission has been disturbed by persistent reports of unconstitutional and violent acts by some agents of justice in the United States.
>
> "After an extensive review of these allegations and the entire field of administration of justice, the Commission authorized a study of three problems: (1) police brutality and related private violence; (2) the Civil Rights Acts and their enforcement; and (3) jury exclusion."

> "The Commission's study of the administration of justice concentrates on police brutality—the use of unlawful violence—against Negroes. Complaints and litigation suggest four subdivisions of the problem. The first involves the use of racially motivated brutality to enforce subordination or segregation. The second, a not altogether separate category, entails violence as a punishment. The third relates to coerced confessions. The last and largest entails the almost casual, or spontaneous, use of force in arrests. Only the first category necessarily involves

racial discrimination. In the others it may, or may not, be present, but Negroes are the victims with disproportionate frequency.

"In the text of this chapter the Commission briefly describes the alleged facts in 11 typical cases of police brutality. They are presented in the belief that they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in this study."

"*Search, seizure, and violence: Chicago, 1958.*— The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the Plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that:

> . . . . (O)n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the

> floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him."

> "Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world."

Under the Court's theory of this case this is the total of *Justice* that can be considered. It is submitted that from such total evidence from *Justice* in the record, one could only conclude that the Commission was reporting allegations of a complaint and that Time, when it translated such allegations into findings of fact, committed a known falsity and was guilty of malice.

2. In its Opinion this Court relies on the fact that the researcher of the Time story believed that the Commission took the charges against Pape to be true (pages 5, 6 and 10). Nowhere in the record in this cause did the researcher state that she believed the Time article to be true or that she believed the Commission felt the charges against Pape were true. If this Court is to review the record on the trial, it must be bound by such record.

3. In its Opinion this Court engages in the lengthy process of weighing the evidence in the trial court and thus abandons the time-honored principle that a case should not be taken from the jury on motion from directed verdict if there is any evidence from which a fair-minded jury might find for the non-moving party. In so doing this Court sacrifices not only the right of an individual to his privacy and to be let alone, but also the right to trial by jury on the altar of press freedom.

4. In its opinion this Court attempts to limit its opinion to the facts of this particular case, which abandons the time-honored principles governing this Court on Writs of Certiorari. On such writs this Court only considers a matter in order to resolve conflicts of propositions of law between other opinions of this Court, opinions of the various circuits or to resolve conflicts involving important constitutional questions; by its limitation of its opinion to the facts of this case this Court attempts to limit this precedent only to a weighing of the facts which usually is the function of a jury.

5. By this opinion mere protestations of good faith by an author are capable of defeating any libel action contrary to this Court's previous holding in *St. Amant* v. *Thompson*, (390 U.S. 727).

Respectfully submitted,

PATRICK W. DUNNE
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Attorneys for Respondent,
Frank Pape

DATED: MARCH 18, 1971

CERTIFICATE OF ATTORNEY

PATRICK W. DUNNE, being first duly sworn, on oath deposes and says that he is the attorney in charge of the prosecution of the above-entitled cause; that he is familiar with all of the facts and the law involved in the above-entitled cause; that the above Petition for Rehearing is presented in good faith and is not for the purpose of delay.

/s/ Patrick W. Dunne
PATRICK W. DUNNE
33 North Dearborn Street
Chicago, Illinois 60602

SUBSCRIBED and sworn to before me this 18th day of March, A.D., 1971.

/s/ Bernadette M. Mika
NOTARY PUBLIC

(SEAL)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TIME, INC. *v.* PAPE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 109. Argued December 16, 1970—Decided February 24, 1971

In a discussion of "police brutality and related private violence" in its 1961 Report, the Civil Rights Commission mentioned the case of *Monroe* v. *Pape*, 365 U. S. 167, and listed some of the allegations of Monroe's civil rights complaint filed against certain Chicago policemen headed by Deputy Chief of Detectives Pape. In an article about the Report, Time magazine quoted from a summary of the complaint, without indicating that the charges were Monroe's and not the independent findings of the Commission. Pape sued the petitioner publisher for libel. The Court of Appeals reversed the District Court's grant of Time's motion for summary judgment, holding that there had to be a trial on the question of whether Time's failure to make clear that it was reporting no more than allegations showed "actual malice" (knowledge that the information was false or reckless disregard of whether it was false or not) under the rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. At the trial the author of the article and the researcher admitted awareness that the wording of the Report had been significantly altered but insisted that its real meaning had not been changed. The District Court granted Time's motion for a directed verdict at the close of the evidence, but the Court of Appeals reversed, holding that the jury should determine whether the omission of the word "alleged" showed "actual malice." Both courts agreed that Pape was a "public official" and that the article concerned his "official conduct." *Held:* In the circumstances of this case the magazine did not engage in a "falsification" sufficient in itself to sustain a jury finding of "actual malice." Pp. 5–13.

(a) The magazine's omission of the word "alleged" amounted to the adoption of one of several rational interpretations of a document bristling with ambiguities, and while that choice might

Syllabus

reflect a misconception, it was not enough to create a jury issue of "malice" under the rule of *New York Times*, *supra*, as it would impose a stricter standard of liability on errors of interpretation or judgment than on errors of historic fact. Pp. 10–11.

(b) This holding is confined to the specific facts of this case, and nothing herein is to be understood as making the word "alleged" a superfluity in published reports of information damaging to reputation. P. 13.

419 F. 2d 980, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACK, J., filed an opinion concurring in the judgment, in which DOUGLAS, J., joined, see No. 62, *Monitor Patriot Co.* v. *Roy*. HARLAN, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 109.—October Term, 1970

Time, Incorporated, Petitioner, v. Frank Pape. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 24, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

In November, 1961, the United States Commission on Civil Rights issued the fifth volume of its Report for that year, a document entitled *Justice*. A part of *Justice* was devoted to a study of "police brutality and related private violence," and contained the following paragraph:

> "*Search, seizure, and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violations of the Federal Civil Rights Acts on the basis of a complaint which alleged that:
>
> ". . . [O]n October 29, 1958, at 5:45 a. m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the chil-

dren and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on 'open' charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him." *Justice*, at 20–21.

A week later, *Time*, a weekly news magazine, carried a report of the Commission's new publication. The *Time* article began:

> "The new paperback has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission."

There followed a description, with numerous direct quotations, of one of the incidents described in *Justice*, and then the following account of the Monroe incident:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a. m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice*, 'broke through two doors, woke the Monroe couple with flashlights . . . .'"

The *Time* article went on to quote at length from the summary of the Monroe complaint, without indicating in any way that the charges were those made by Monroe rather than independent findings of the Commission.

Pape sued *Time* for libel in the United States District Court for the Northern District of Illinois, there being diversity of citizenship. *Time* moved to dismiss the suit on the ground that the article was fair comment on a government report and therefore privileged under Illinois law; the District Court granted the motion, but the Court of Appeals for the Seventh Circuit reversed. 318 F. 2d 652. After remand, this Court decided *New York Times* v. *Sullivan*, 376 U. S. 254, and on the basis of that decision the District Court granted *Time's* motion for summary judgment. On appeal, the Court of Appeals again reversed, holding that there must be a trial on the question of whether *Time's* failure to make clear that it was reporting no more than allegations showed "actual malice." 354 F. 2d 558.

At the trial, Pape called the policemen who had participated in the Monroe raid. They all testified that nothing ressembling the events described in the *Time* article as findings of the Commission had occurred.* There was also extensive testimony from the *Time* staff member who had written the article and from the "researcher" who had been responsible for checking its factual accuracy. The author testified that he had written the article on the basis of the *Justice* report itself, a Commission press release accompanying the report, and a *New York Times* news story describing *Justice*. He conceded that he knew the meanings of the words "alleged" and "complaint," but denied that the *Time* article

*On January 24, 1963, after a jury finding of liability, judgment was entered against Pape in the civil rights suit brought against him by Monroe. The jury awarded Monroe damages of $8,000. Pape did not appeal, and the judgment was satisfied.

was false, given the full context of the *Justice* report. The researcher testified that she had consulted several newspaper articles describing Monroe's claims about the raid, and several articles describing Pape's previous career. She said that she had also read two dispatches from *Time's* Chicago correspondent, one of them describing Monroe's charges without comment as to their truth and the other asserting as fact that the events had actually occurred. She conceded that she was aware of the omission of the word "alleged" in the *Time* article, but said that she believed the article to have been true as written.

At the close of the evidence, the District Court granted *Time's* motion for a directed verdict, 294 F. Supp. 1087, and Pape appealed for a third time. The Court of Appeals again reversed the District Court, holding that it was for the jury to determine whether *Time's* omission of the word "alleged" showed "actual malice." 419 F. 2d 980. We granted certiorari in order to decide the constitutional issue presented under the First and Fourteenth Amendments. 397 U. S. 1062.

The District Court and the Court of Appeals were in agreement that the plaintiff Pape was a "public official" by virtue of his position as Deputy Chief of Detectives of the Chicago Police Department, and that the charges contained in the Monroe complaint, the *Justice* report, and the *Time* story concerned his "official conduct." The two courts differed only in their application of the rule of *New York Times* v. *Sullivan*, 376 U. S. 254, which "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280.

The only question before us, therefore, is whether the Court of Appeals correctly applied this constitutional rule to the facts of this case in reversing the directed verdict for the defendant. Inquiries of this kind are familiar under the settled principle that "[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will examine the evidentiary basis on which those conclusions are founded." *Niemetko* v. *Maryland*, 340 U. S. 268, 271. Cf. *Napue* v. *Illinois*, 360 U. S. 264, 271–272. And in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review "the evidence in the . . . record to determine whether it could constitutionally support a judgment" for the plaintiff. *New York Times*, *supra*, at 284–285; *Beckley Newspaper* v. *Hanks*, 389 U. S. 81, 83; *St. Amant* v. *Thompson*, 390 U. S. 727; *Greenbelt Pub. Assn.* v. *Bresler*, 398 U. S. 6, 11.

The *Time* news article reported as a charge by the Commission what was, in its literal terms, a description by the Commission of the allegations in a complaint filed by a plaintiff in a civil rights action. This situation differs in a number of respects from the conventional libel case. First, the publication sued on was not *Time's* independent report of the Monroe episode, but its report of what the Civil Rights Commission had said about that episode. Second, the alleged damage to reputation was not that arising from mere publication, but rather that resulting from attribution of the Monroe accusations to an authoritative official source. Finally, *Time* made no claim of good-faith error or mere negligence. Both the author of the article and the researcher admitted to an awareness at the time of publica-

tion that the wording of the Commission Report had been significantly altered, but insisted that its real meaning had not been changed.

The Court of Appeals concluded that it was obvious that the omission of the word "allegation" or some equivalent was a "falsification" of the Report. Since the omission was admittedly conscious and deliberate, the only remaining question in the court's view was whether there had been "malice" in the sense of an "intent to inflict harm through falsehood." Such an intent, the court thought, might reasonably be inferred from the very act of deliberate omission, and the issue of malice was consequently one for the jury.

Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account of events which speak for themselves. For example, in *St. Amant, supra*, it made good sense to separate the question of the truth of St. Amant's charges of corruption and official misbehavior from the question of whether he had an adequate basis to believe them true. But a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the "truth" of such an indirect newspaper report presents rather complicated problems.

A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact—such as that a policeman has arrested a certain man on a criminal charge—there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. Any departure from full direct quota-

tion of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices.

The Civil Rights Commission's *Justice* report is a typical example of these problems. The underlying story which gave the report newsworthiness was the picture of police violence against citizens. Many of the incidents included were quite clearly designed to shock, anger, and alarm the reader, indeed to move him into a position of support for specific legislative recommendations of the Commission. Yet the attitude of the Commission toward the factual verity of the episodes recounted was anything but straightforward.

First, the episodes were presented in the context of a report which from the first page purported to be dealing with a problem of unquestionable reality and seriousness:

> "In 1931 President Hoover's Wickersham Committee found extensive evidence of police lawlessness, including unjustified violence. Sixteen years later another Presidential Committee, this one appointed by President Truman, concluded that police brutality, especially against the unpopular, the weak, and the defenseless, was a distressing problem. And now in 1961 this Commission must report that police brutality is still a serious problem throughout the United States." *Justice*, at 1.

Two pages later, the report said that

> "The Commission is particularly impressed by the fact that most police officers never resort to brutal practices. Because of this fact, instances of brutality or discrimination in law enforcement stand out in bold relief. It is hoped that by focusing the attention of the President, the Congress, and the public on these remaining incongruities, this Report may contribute to their correction."

This process of focusing attention began on the next page with the chapter heading, in large type: "UNLAWFUL POLICE VIOLENCE." There followed the crucial description of the foundations on which the ensuing reports were based:

> "In the text of this chapter the Commission briefly describes the alleged facts in 11 typical cases of police brutality. They are presented in the belief that they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appear substantial enough to justify discussion in this study."

This statement may fairly be characterized as extravagantly ambiguous. On the one hand, what was to follow was "11 typical cases of police brutality," each of which "contributes to an understanding of the problem," and was "substantial enough to justify discussion" in the study. A range of sources was described, each of a nature to inspire confidence in the reader. *But*, the reader was nonetheless told that these were "alleged facts," "allegations of misconduct," which had not been "determined conclusively" to be "correct." The suggestion that such a conclusive determination could be made only by a court capped the confusion: in context it was impossible to know whether the Commission was seeking to encourage belief or skepticism regarding the incidents about to be described.

Turning the page, the reader was confronted with another heading in capitals, "PATTERNS OF POLICE BRUTALITY," and then the descriptions of the various incidents began. Each had an italicized heading (*e. g.*, *"The killing of a Negro in Georgia: 1943"*) followed by an account giving both sides of the story and carefully describing all facts as "alleged" or using direct quotations. The tone of total neutrality as to the truth or falsity of the claims of brutality was frequently marred, however, by remarks that appeared to indicate the Commission's unexpressed views. At the end of a description entitled *"The killing of a Negro in Georgia: 1958,"* for example, the report said, "[n]o local disciplinary or criminal action was taken against any of the officers involved. The attitude of local authorities toward police was protective in this and several other cases of alleged brutality that occurred within a brief period . . . ." *Id.*, at 11.

The description of the Monroe incident bore the italicized title: *"Search, seizure, and violence: Chicago, 1958."* Unlike the reports of the other incidents, however, this report limited itself to the summary of a plaintiff's complaint in a lawsuit, as indicated at the outset of this opinion. No attempt was made to give any other version of the story, and the next report (*"The killing of a Negro in Cleveland: 1959"*) followed immediately after the end of the quotation.

In a chapter entitled "Conclusions," the Commission set forth its findings and recommendations. These included a finding that "police brutality by some State and local officers presents a serious and continuing problem in many parts of the United States. Both whites and Negroes are the victims, but Negroes are the victims of such brutality far more, proportionately, than any other group in American society." The recommendations included proposals for a grant-in-aid program to

improve the quality of state and local police forces and for passage of a federal statute outlawing illegal police violence. *Id.*, at 109–112. Since the series of incidents described earlier in the report were the only evidence the Commission presented in support of its findings and recommendations, there was a logically inevitable implication that the Commission must have believed that the incidents described had in truth occurred.

In light of the totality of what was said in *Justice*, we cannot agree that, when *Time* failed to state that the Commission in reporting the Monroe incident had technically confined itself to the allegations of a complaint, *Time* engaged in a "falsification" sufficient in itself to sustain a jury finding of "actual malice." The author of the *Time* article testified, in substance, that the context of the report of the Monroe incident indicated to him that the Commission believed that the incident had occurred as described. He therefore denied that he had falsified the report when he omitted the word "alleged." The *Time* researcher, who had read newspaper stories about the incident and two reports from a *Time* reporter in Chicago, as well as the accounts of Pape's earlier career, had even more reason to suppose that the Commission took the charges to be true.

Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*. To permit the malice issue to go to the jury because of the omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of

liability on errors of interpretation or judgment than on errors of historic fact.

New York Times was premised on a recognition that, as Madison put it, "some degree of abuse is inseparable from the use of every thing; and in no case is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution (1876), p. 571. With respect to errors of fact in reporting events, we said in *New York Times:*

> "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgements virtually unlimited in amount—leads to . . . 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U. S., at 279.

These considerations apply with even greater force to the situation where the alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of "truth" that would not put the publisher virtually at the mercy of the unguided discretion of a jury.

In certain areas of the law of defamation, *New York Times* added to the tort law of the individual States a

constitutional zone of protection for errors of fact caused by negligence. The publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to an indeterminable financial liability. This protection would not exist for errors of interpretation were the analysis of the Court of Appeals to be adopted, for once a jury was satisfied that the interpretation was "wrong," the error itself would be sufficient to justify a verdict for the plaintiff.

In *St. Amant* v. *Thompson, supra,* at 731, we said:

> "Our cases . . . have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra,* the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana,* 379 U. S. 64 (1964) . . . the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of . . . probable falsity.' 379 U. S., at 74. . . . These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

Applying this standard to *Time's* interpretation of the Commission Report, it can hardly be said that *Time* acted in reckless disregard of the truth. Given the ambiguities of the Commission Report as a whole, and the testimony

of the *Time* author and researcher, *Time's* conduct reflected at most an error of judgment. We have held that if "the freedoms of expression are to have the breathing space that they need to survive" misstatements of this kind must have the protection of the First and Fourteenth Amendments. *New York Times, supra,* at 271–272.

We would add, however, a final cautionary note. Nothing in this opinion is to be understood as making the word "alleged" a superfluity in published reports of information damaging to reputation. Our decision today is based on the specific facts of this case, involving as they do a news report of a particular government publication that purported to describe the specific grounds for perceiving in 1961 "a serious problem in the United States." "Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirabiilty or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson, supra,* at 732.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

For separate opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, see No. 62.

SUPREME COURT OF THE UNITED STATES

No. 109.—October Term, 1970

Time, Incorporated, Petitioner, v. Frank Pape. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 24, 1971]

Mr. Justice Harlan, dissenting.

I would affirm the judgment of the Court of Appeals, essentially for the reasons stated in Judge Duffy's opinion for that court. The treatment of this case by our Court, however, prompts me to venture these additional comments.

I fully agree with the rule first enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), that restricts the liability of those who utter defamatory falsehoods regarding public officials. We there recognized that because "erroneous statement is inevitable in free debate," *id.*, at 271, "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct." *Id.*, at 273. But these considerations did not persuade us to rule that the Constitution grants absolute immunity to everyone, be it the news media or anyone else, who libels a public official, nor to conclude that the usual processes of law are inadequate for dealing with this kind of litigation. Rather, we decided that the substantial First Amendment interests implicated in any libel suit of this sort would be adequately served by a constitutional rule that subjects such a statement to the sanctions of the common law of libel only where it was uttered "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280.

The step taken today, whereby this Court undertakes to judge, "on the specific facts of this case," *ante*, at 13, whether a jury could reasonably find that Time Magazine's characterization of the Commission's report was sufficiently inaccurate to permit the concomitant finding that it was published with "malice," is, in my judgment, not warranted.

I can perceive no rational basis for distinguishing this case from one in which a newspaper or an individual seeks to have this Court review the record upon which a properly instructed jury found liability, where evidence sufficient to support its verdict exists, and where these matters have been reviewed by a court of appeals applying correct legal standards. As I see things, the Court identifies no such distinguishing feature about this case.

While it is true, of course, that this Court is free to reexamine for itself the evidentiary bases upon which rest decisions that allegedly impair or punish the exercise of Fourteenth Amendment freedoms, this does not mean that we are of necessity always, or even usually, compelled to do so. Indeed, it is almost impossible to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional issues. Nor can I discern in those First Amendment considerations that led us to restrict the States' powers to regulate defamation of public officials any additional interest that is not served by the actual malice rule of *New York Times*, *supra*, but is substantially promoted by utilizing this Court as the ultimate arbiter of factual disputes in those libel cases where no unusual factors, such as allegations of harassment or the existence of a jury verdict resting on erroneous instructions, cf. *New York Times*, *supra*, are present. While I am confident that the Court does not intend its decision to have any such broad

reach, I fear that what is done today may open a door that will prove difficult to close.

Having determined that the court below properly defined the quality of proof required of Pape by *New York Times* and that it applied the correct standard of review in passing upon the trial judge's decision to grant a directed verdict—determinations that I do not think my Brethren dispute—I would stop the inquiry at this point and affirm the judgment of the Court of Appeals.